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VOL. V.]

[PART I.

# REPORTS OF CASES

DECIDED

## IN THE HIGH COURT

OF

### GRIQUALAND.

REPORTED BY

P. M. LAURENCE, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

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VOL. V.—PART I.

JANUARY to JUNE, 1888.

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CAPE TOWN:

J. C. JUTA & CO.

1888.

# HIGH COURT OF GRIQUALAND.

JANUARY TO JUNE, 1888.

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P. M. LAURENCE\* [Judge President].

W. H. SOLOMON [First Puisne Judge].

A. W. COLE\* [Second Puisne Judge].

W. M. HOPLEY [Crown Prosecutor].

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\* The acting appointments of Mr. Justice Laurence as Judge President, and Mr. Cole, Q.C., as Puisne Judge, were confirmed on March 16, 1888.

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1. PRACTICE.—*Pleading. — Exception. — Principal and agent. —*

*Contract with promoters.*—Where a defendant had excepted to the plaintiff's declaration on the grounds (1) that the facts set forth disclosed no cause of action against him, (2) that the plaintiffs were not the proper parties to sue, and the plaintiffs had thereupon barred the defendant for not pleading over, the Court granted an application by the defendant for the removal of the bar. A contract for the sale and transfer of a mining lease was made by L. with certain guarantors for a projected company, to whose nominees L. agreed to transfer the lease. The company having been formed, the trustees sued H. for specific performance of this contract, alleging that they had subsequently discovered that H. was the undisclosed principal of L.:—*Held*, on exception, that the facts as set forth disclosed a cause of action against H., but that the trustees of the company not being, so far as appeared, either the nominees or cessionaries of the original contracting parties, were not the proper persons to sue on the contract, and the exception on this ground must therefore be sustained. *O'Leary and Another vs. Harbord* .. 1

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3. ———— *Arrest.—Attorney and client.—Power to defend proceedings.—Rules of Court 8, 9, 28—Judgment debt.—Set-off.*—  
M. arrested F. for a debt secured by liquid documents. The writ having been discharged with costs, F. refused to set-off his costs against the larger sum which he owed to M. and took out a writ for the amount. M. paid the amount claimed, and thereafter applied to the Court to order C., who was F.'s attorney in the matter of the arrest, but who had filed no power from him to defend the proceedings, to refund the amount so paid :—*Held*, that, while the writ ought not to have been taken out and an application to restrain its execution would probably have been granted, it could not be set aside and a refund ordered except after notice to F. of the application, and that the application against C. must therefore be refused. *Semble*, it is unnecessary in motion cases for the respondent's attorney to file a power with the Registrar. *Mosenthal Bros. vs. Coghlan & Coghlan* .. 87
- *Pleading.—Exception.—Alternative relief.—Inconsistent allegations.—Rule of Court 330*—A plaintiff alleged in his declaration that the defendant was in use and occupation of a certain stand by his permission and as his tenant, and in the alternative that the said occupation was against his will, and notwithstanding an order which he had obtained for the defendant's ejection, and claimed alternative relief on these statements; *held*, on exception, that, while the plaintiff could draw alternative conclusions of law and claim relief corresponding thereto, the declaration as it stood was embarrassing and must be amended by the omission of the inconsistent allegations of fact therein contained. *Muller vs. London and South African Exploration Co., Ltd.* .. .. . 106
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RECEIVER— <i>Mining Board</i> — <i>Act 11, 1867, § 6.</i> — <i>Act 18, 1886, § 11.</i> — <i>Appropriation of Payments.</i> — <i>Interest.</i> — <i>Acquiescence.</i> — <i>Costs.</i> —The debt due by the Kimberley Mining Board upon which interest is to be reckoned, as provided by Acts 11 of 1867 and 18 of 1886, consists of the original debt together with the interest accrued due thereon previous to the filing of their claims with the master by the creditors of the board. The proceeds of rates levied to liquidate the said debt must be applied in the first instance to payment of current interest and then to reduction of the principal. Where a creditor of the board had accepted and acquiesced in various payments made on account by the receiver on an erroneous basis, the Court refused to order immediate payment of the balance due on a readjustment of the accounts, but directed the receiver to credit the plaintiff with such balance and follow the correct method in future payments. Where the relief obtained by a plaintiff could have been equally obtained by means of a special case, the Court allowed only such costs as would have been incurred if a special case had been prepared. <i>Bank of Africa vs. Craven, N. O.</i> .. .. . 112
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# CASES DECIDED

IN THE

## HIGH COURT OF GRIQUALAND.

### VOL. V.—PART I.

1888, 2057

*See Letter to Mr. Loubser de Villiers, 2/12/88*

O'LEARY AND ANOTHER *vs.* HARBORD.

*Practice.—Pleading.—Exception.—Principal and Agent.—  
Contract with Promoters.*

Where a defendant had excepted to the plaintiffs' declaration on the grounds (1) that the facts set forth disclosed no cause of action against him, (2) that the plaintiffs were not the proper parties to sue, and the plaintiffs had thereupon barred the defendant for not pleading over, the Court granted an application by the defendant for the removal of the bar.

A contract for the sale and transfer of a mining lease was made by L. with certain guarantors for a projected company, to whose nominees L. agreed to transfer the lease. The company having been formed, the trustees sued H. for specific performance of this contract, alleging that they had subsequently discovered that H. was the undisclosed principal of L. Held, on exception, that the facts as set forth disclosed a cause of action against H., but that the trustees of the company, not being, so far as appeared, either the nominees or cessionaries of the original contracting parties, were not the proper persons to sue on the contract, and the exception on this ground must therefore be sustained.

This was an action arising out of the same matter as the case of *Abbott and Another vs. Lynch*, reported above, Vol. IV., p. 400. The plaintiffs, Messrs. J. J. O'Leary and S. C. Vol. V. PART I. G. W.

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Austen, sued in their capacity as the trustees for the time being of the Otto's Kopje Diamond Mining Syndicate, Kimberley, Limited, which was a company duly incorporated under Act 23 of 1861. The declaration alleged that the defendant was the lessee from the Colonial Government of a certain diamond mine known as the Otto's Kopje Mine and situate in the District of Kimberley. On May 26, 1887, one Lynch was the holder of a general power of attorney from the defendant and acted for the defendant as his duly authorized agent in entering into a certain agreement, and in all the subsequent matters in connection therewith until the cancellation of the said power. By the said agreement, made on the above date, the said Lynch, acting as aforesaid, contracted with certain guarantors for a syndicate to be formed, for the consideration in the said agreement mentioned, to cede and transfer the said lease to the nominee or nominees of the said guarantors. By the said agreement it was contemplated and stipulated that the said guarantors should unite and form themselves into a syndicate association or company, with limited liability, to be called the "Otto's Kopje Syndicate, Limited," for the purpose of carrying out the objects therein set forth, and in pursuance thereof the parties thereto formed themselves into a company as above set forth. The declaration proceeded as follows:—

7. Upon the formation of such company the said Thomas Lynch accepted in consideration of the cession, assignment and transfer of the defendant's right, title, and interest in and to the said lease 5000 fully paid-up vendors' shares in the said company, that being the full consideration to which the defendant was under the said agreement entitled for such cession, assignment and transfer.

8. The said agreement has been duly incorporated in and forms part of the memorandum and articles of association of the said company, a copy whereof marked A is hereunto annexed, and the plaintiffs pray that it may be considered as inserted herein.

9. The said memorandum and articles of association were duly signed and executed by the said Thomas Lynch as agent of the defendant and subsequently by the defendant in person.

10. By reason of the premises and as a matter of fact the said company upon its formation became entitled to all the rights and benefits to which the guarantors for the formation of the said company were entitled under the said agreement with the defendant.

11. By the 65th and 67th sections of the memorandum and articles of association of the said company, to which the plaintiffs crave leave to refer,

the right to receive and compel transfer of the said lease from the defendant on behalf of the said company is vested in the plaintiffs in their aforesaid capacity.

12. All times have elapsed, all conditions have been performed, and all things have happened to entitle the plaintiffs to demand cession, assignment and transfer of the said lease into their names, and to enforce the fulfilment of the said agreement by the defendant, and to maintain this action, yet the defendant, though thereunto requested, has refused and still refuses to cede, assign, set over, or transfer his right, title and interest in and to the said lease to the plaintiffs.

13. By reason of the refusal of the defendant to fulfil his contract and to transfer the said lease to the said company it has sustained great loss and damage, to wit in the sum of £5000 0s. 0d.

The plaintiffs claimed specific performance of the said agreement, together with £5000 as damages for the defendant's neglect and delay in performing it, general relief, and costs of suit.

The plaintiffs having called upon the defendant in terms of Rule of Court 330 (*b*) to plead, answer, except, or make claim in reconvention, the defendant before pleading excepted to the declaration on the following grounds:—

(1.) By the said declaration it is alleged that the said Thomas Lynch entered into the agreement of the 26th of May, 1887, as the duly authorized agent of the defendant under a general power of attorney, whereas it appears from the express terms of the said agreement annexed to the declaration that the said agreement was entered into by the guarantors with the said Thomas Lynch in his sole and individual right as the alleged holder of the said lease, and in no way as the agent of the defendant under the said power of attorney, and that exclusive credit was given to the said Thomas Lynch personally by the guarantors in entering into the said agreement on the allegation by the said Thomas Lynch in the said agreement contained that he the said Thomas Lynch personally was the holder of the said lease.

(2.) Even if the said Thomas Lynch entered into the said agreement as the duly authorized agent of the defendant, yet the defendant excepts to the declaration in that it discloses no ground nor cause of action which the plaintiffs in their capacity as set forth are entitled to have and maintain against the defendant.

(3.) That the declaration is otherwise vague, embarrassing and bad in law.

The plaintiffs then proceeded to bar the defendant from pleading, on the ground that he should not merely have excepted but should have pleaded over, and the defendant applied to the Court to remove the bar, and also set the case down for argument on the exceptions.

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The COURT decided to take the argument on exceptions first, on the ground that if the exceptions to the declaration were upheld, and the declaration quashed as prayed, the question whether the defendant had been properly barred from pleading to it would not arise.

*Frames*, in support of the exceptions, said that the contract or "memorandum of agreement," annexed to the articles of association of the plaintiff company, and on which the plaintiffs sued, purported to have been made by Lynch as principal, and contended that in a case of this kind parol evidence was not admissible to shew that the party purporting to contract on his own behalf was really the agent of another.

LAURENCE, J., observed that it did not appear from the declaration whether the plaintiffs' case was that they had known at the time of making the agreement that Lynch was acting as agent for the defendant or whether they had only discovered this afterwards, and that this might be very material.

*Guerin*, for the plaintiffs, said that they contended that in either event they would be entitled to maintain the present action, but they were prepared to amend the declaration by inserting an allegation that at the time of the agreement they believed Lynch to be acting as principal, and only subsequently discovered that he had contracted as agent for the defendant.

The COURT directed that this amendment should be made and the case argued on that basis.

*Frames* said that there was nothing to shew that the defendant had received the consideration, and it was not so alleged in the declaration. He referred to *Story on Agency*, §§ 117, 151, 163. As to the principle laid down in *Higgins vs. Senior*, 8 M. & W. 834, that parol evidence was admissible to charge a principal not named in a contract though not to discharge an agent contracting in his own name, that was a rule of English law which applied only to maritime



and commercial contracts of a special kind. [LAURENCE, J., referred to *Jones vs. Littledale*, 6 A. & E. 486, and other cases and authorities cited in *Preston and Dixon vs. Biden's Trustee*, 1 H. C. 283 *et seqq.*] He also referred to *Humble vs. Hunter*, 12 Q. B. 310; *Browning vs. Provincial Insurance Company of Canada*, L. R. 5 P. C. 263; *Thomson vs. Davenport*, 2 Sm. L. C. 7th Ed. 364; *Taylor on Evidence*, § 1054; *Pothier on Obligations*, § 447; *Mackeldeii Syst. Jur. Rom.* § 393. [SOLOMON, J., referred to *Lippert & Co. vs. Desbats*, Buch. 1869, 189.] That was another case of a charter-party, and in the construction of the liabilities arising on such documents special rules had been introduced in favour of commerce. Apart from the general law, it was clear from the terms of the present contract that credit was given exclusively to Lynch; there was a provision that in the event of the venture being abandoned the syndicate should re-transfer the lease to Lynch "in his sole and individual right or to persons to be nominated by him." As to the second exception, whether the defendant could be sued or not, the plaintiffs had no right to sue. It was a clear principle of law that promoters could not contract on behalf of an inchoate company, and the company when formed could not ratify their contracts: *Kelner vs. Baxter*, L. R. 2 C. P. 174; *In re Empress Engineering Co.*, 16 Ch. D. 125; *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16. As soon as the company was formed a fresh contract should have been made; on the present contract the company could neither sue nor be sued, and there was nothing to shew that the trustees of the company for the time being were the nominees of the guarantors.

*Guerin*, for the plaintiffs, was instructed that this was a mining lease under Act 19 of 1883, which did not require registration under the Griqualand West Ordinance, No. 16 of 1880, and in fact was not registered, though of course the guarantors should have inspected it before entering into this contract. He contended that the cases and authorities cited by the defendant were really in favour of the plaintiffs' contention, which was simply that a principal could be held liable for the acts of his agent. There was no distinction in law between commercial documents and other contracts, and

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if there were this was a commercial contract. The plaintiffs would be able to prove ratification if necessary, and were prepared to amend the declaration by alleging this if required, and as it stood the annexures shewed that the defendant had signed the trust deed in person and accepted some of the "vendors' shares;" but their case was that Lynch had acted throughout under the defendant's mandate and on his behalf. The plaintiffs had really contracted with the defendant, but only found out afterwards who was the real party to the contract. If Lynch had acted beyond his powers that would be matter for defence, not for exception. He relied on *Lippert & Co. vs. Desbats*, cited above, and also referred to *Beckham vs. Drake*, 9 M. & W. 79; *Carr vs. Jackson*, 21 L. J. N. S. Ex: 137; *Calder vs. Dobell*, L. R. 6 C. P. 486; *Smith's Mercantile Law*, 9th Ed. 139. As to the second exception, he contended that the articles of association clearly shewed that all the rights of the guarantors had been transferred to the syndicate, and that the trustees of the company were in effect the nominees or cessionaries of the original guarantors. Article 67 provided that "the several shareholders (who included all the original guarantors) shall and they do by these presents assign and set over in trust all right and title in and to their respective shares and interests in the capital, property, estate, chattels, effects, actions, credits, and other things of the said company unto the said trustees and to the trustees of the company for the time being, &c."

*Frames* replied.

The COURT reserved judgment and proceeded to hear the argument on the defendant's application for the removal of the bar, and upon this matter called on

*Guerin*, for the respondents, who contended that the defendant should have pleaded over, and not having done so had been properly barred from pleading. The cases in which a defendant might except without pleading were enumerated by *Van der Linden*, III. 1, 15, pp. 413-416; *Van Leeuwen's Comm: Tr. Kotze*, II. 458-460; *Voet*, 44. 1, 3. He also cited *Robertson and Another vs. Executrix of Ziervogel*, 3 Menz. 354; *Cunningham and Mattinson's Pleading*, 296, s. v. 'De-

murrer.' If the second exception was distinctly one of *non-qualification*, which he did not admit, no doubt it might properly be taken without pleading, but in any event the first exception was one which required to be supported by a plea in the event of its being over-ruled.

*Frames* was not called upon.

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LAURENCE, J.:—The defendant in this case has taken two exceptions. The effect of the first is that even if the plaintiffs have a right of action against somebody, on their own shewing they have none against the defendant; the effect of the second is that, even if a right of action exists, the plaintiffs are not the right parties, and do not possess the proper qualification to sue. On the whole I think that although, as a general rule, the proper course when excepting to a declaration is to plead over, both these exceptions are exceptions of such a nature that the defendant was justified in taking them *in limine*. As to the second, there can be no doubt; as to the first, although it may not fall precisely within the category mentioned by the authorities cited, still an exception that the defendant is, *ex facie* the case set up, not the right person to be sued, that he is altogether *dehors* the matter, and on the plaintiffs' own shewing cannot in any way be liable, seems to stand very much on the same footing as an objection that the plaintiffs, in the capacity they allege, are not the right persons to bring the action. Both questions seem to be questions which the defendant may reasonably ask the Court to determine before he can be required to plead to the merits, although, should they be decided against him, it may be that he will have to make a special application for leave to plead and, the time for pleading having expired, the Court may if it thinks fit put him on terms in granting such leave. Even if the plaintiffs were technically right in their contention as to the first exception, the character of the second exception is such as to justify the defendant in not pleading until it has been determined. In the case which has been cited from *Menzies*, besides the exception "to the quality and title of the plaintiffs," there was an exception that the defendant was not liable upon the premises stated in the declaration to an action in the form in

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which it had been brought, and there were also further exceptions, but no plea was filed, and the majority of the Court appears to have been of opinion that these exceptions were properly taken *initio litis*, and, after hearing and overruling them, gave the defendant time to answer over. Should the present exceptions be eventually overruled, the Court will probably be disposed to adopt a similar course. Meanwhile, it is sufficient to say that in the circumstances I am of opinion that the plaintiffs were premature in barring the defendant from pleading, and the application for removal of the bar must be allowed with costs.

SOLOMON and COLE, JJ., concurred.

*Postea* (Feb. 15),—

The judgment of the Court on the exceptions was delivered by

SOLOMON, J., who said :—This was an argument on certain exceptions which were taken by the defendant to the plaintiffs' declaration. The plaintiffs in the action are the trustees of the Otto's Kopje Diamond Mining Syndicate, Limited, which is a company duly incorporated under Act 23 of 1861, and the defendant is described as a speculator residing in Kimberley. The action is brought for the specific performance of an agreement which, on the face of it, was entered into not between the plaintiffs and the defendant, but between certain guarantors for a syndicate to be thereafter formed and one T. Lynch; and there is also a claim for £5000 damages for delay in the performance of the agreement. The declaration is somewhat lengthy, but the material facts set forth therein are shortly as follows :—That on May 26, 1887, the defendant was, and still is, the lessee from the Colonial Government of the Otto's Kopje Mine; that on the said day an agreement was entered into by certain guarantors for a syndicate to be thereafter formed and one Thomas Lynch, who held the defendant's general power of attorney, and who acted in this matter for the defendant as his duly authorized agent, by which agreement Lynch undertook for a certain consideration to cede the

aforesaid lease to the nominee of the said guarantors; that it was stipulated by the said agreement that the said guarantors should form themselves into a syndicate association or company for the purpose of carrying out the said agreement; and that subsequently, on July 4, 1887, they did form themselves into the Otto's Kopje Diamond Mining Syndicate, Limited; that upon the formation of the company Lynch obtained in terms of the agreement 5000 vendors' shares in the company; that the said agreement was incorporated in the articles of association of the company, and that the articles were signed by Lynch as defendant's agent, and subsequently by the defendant himself; that by reason of the premises the company upon its formation became entitled to all the rights and benefits of the guarantors under the said agreement; and they therefore prayed for specific performance of the agreement and for damages as aforesaid. This is how the declaration originally stood, but at the commencement of the arguments it was pointed out by the Judge President that there was a palpable defect in the declaration, inasmuch as it did not shew whether or not the guarantors, at the time when the agreement was made, knew that Lynch was acting as the defendant's agent, and he suggested that it was desirable that this omission should be supplied before the arguments proceeded. Thereupon the plaintiffs' counsel stated that as a matter of fact the guarantors were not aware at the time that Lynch was acting as an agent in the matter, and he agreed to amend the declaration by inserting a paragraph to that effect. This was subsequently done, and a paragraph numbered 5a has been added to the declaration, which reads as follows: "At the date of the said agreement, and throughout the whole of the transactions hereinafter alleged or referred to and until a short time previous to the commencement of this action, the said guarantors and the plaintiffs believed and acted upon the belief that the said Thomas Lynch in entering into the said agreement and in acting in the said transactions did so as the sole principal therein respectively." To the declaration thus amended the following exceptions are taken by the defendant. [His Lordship read the exceptions.] The third exception may be dismissed in a few words. Had it not been for the addition

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of paragraph 5a I am not prepared to say that this exception would not have been a good one, on the ground that the declaration as it originally stood was vague and embarrassing; but with the additional facts set forth in that paragraph I do not think that the amended declaration can be excepted to on these grounds. I therefore pass on to consider the other two exceptions which are of some importance. Now as this is an argument on exception to the plaintiffs' declaration, we are bound by the statement of facts contained in the declaration. Accordingly, for the purposes of our decision, we assume the following facts:—That at the time when the contract set forth in schedule A was made, Lynch was the duly authorized agent of the defendant, and that the contract was entered into by him as such agent and on behalf of the defendant; that the guarantors at the time believed Lynch to be the principal, and only subsequently discovered that he had been acting as the defendant's agent; and lastly, as no question is now raised as to the extent of Lynch's powers, that he was acting within the scope of his authority in entering into such a contract. Now the agreement on the face of it makes no mention of the defendant, but Lynch is throughout treated as the owner of the lease, and as the principal party to the contract, a fact not to be wondered at when we bear in mind that the guarantors at that time knew nothing of the defendant in connection with this matter. And the question which is raised by the first exception is, shortly, whether under these circumstances the defendant is liable to be sued upon this contract. The question is an interesting and important one, and if it had been now raised for the first time it might have been necessary for us to discuss at some length the principles of the law of agency in order to arrive at a conclusion upon it. But the point is far from being a new one, and has been discussed over and over again in the Courts of law in England, and we are indebted to counsel on both sides for the very full list of English cases which they placed before us in the course of their arguments upon this exception. These cases have, I think, now definitely settled what is the English law upon the subject of agents and undisclosed principals, so that it would be a needless and superfluous task for us to go back into a discussion of first

principles. Moreover as these various cases with scarcely an exception point to the same conclusion, I do not propose now to enter upon a detailed examination of them, but I shall content myself with stating what appear to be the principles of law established by these decisions, and I shall then shortly refer to a few of the more important cases upon this subject. Now in the first place the general principle of the English law is clear that, where a party contracts with an agent, believing at the time that he is the principal, the undisclosed principal is bound by the contract, and is entitled to enforce it. The only practical difficulty in the application of this principle arises in cases of *written* contracts by reason of the rule of evidence which provides that the contents of a written agreement cannot be varied or contradicted by oral evidence; and it has accordingly been contended in many cases that to allow parol evidence to be given to prove that a person, who does not appear on the face of the agreement to be a contracting party, is in reality one of the parties to the contract, would be a breach of this rule of evidence. The law, however, on this point has been now definitely settled by a series of decisions, and the rule, as established by these decisions, is that, though parol evidence is not admissible for the purpose of discharging the *apparent* party to the contract, it may be admitted for the purpose of introducing the *real* party. The apparent party to the contract, the agent, is estopped from denying his liability, inasmuch as by his conduct he led the other contracting party to believe that he was really the principal; and on the other hand the principal cannot escape liability on a contract to which he was in reality a party by taking advantage of the form in which the contract was made by his agent. Consequently the other contracting party can elect whether he shall proceed against the agent or against the principal. If, however, the other party at the time when the contract was made knew that the person who signed the contract was merely an agent, and knew who his principal was, but nevertheless chose to give credit exclusively to the agent, in that case he cannot hold the principal liable. I need only further add that in all cases the rights of the undisclosed principal and the other contracting party are subject to

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these qualifications, that the principal must take the contract subject to all equities in the same way as if the agent were the real principal, and secondly that the state of the account between the principal and the agent must not be altered to the prejudice of the former. Having set forth these general principles I shall now very shortly glance at three or four of the principal cases in which these questions have arisen. In the case of *Higgins vs. Senior* (8 M. & W. 844), in which the apparent party, the agent, was sued upon a written agreement for the sale of goods, Baron Parke laid down the law as follows:—"There is no doubt that where such an agreement is made it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shews that it also binds another, by reason that the act of the agent in signing the agreement, in pursuance of his authority, is in law the act of the principal." This statement of the law has been adopted and followed in all the later cases, and may be taken as correctly setting forth the rules on the subject. In the case of *Calder vs. Dobell* (L. R. 6 C. P. 490) Bovill, C.J., after quoting with approval these remarks of Parke, B., proceeds thus—"The principal may sign by the hand of another in his own name, or in a fictitious name, or by means of a stamp, and so become a party to the contract in various ways." The case of *Beckham vs. Drake* (9 M. & W. 79) was an action on a contract of service entered into between the plaintiff of the one part, and A. and B. of the other part, and in which the plaintiff sued A., B. and C., C. being a dormant partner in the firm, which consisted of A., B. and C. The plaintiff at the time did not know that C. was a partner; it was held that the action was maintainable against A., B. and C., although C. was not a party to the agreement, nor named in it, on the ground that A. and B. had acted as agents for the firm. In giving judgment in that case Baron Parke said: "The doctrine rests upon the principle that the act of the agent

was the act of the principal, and the subscription of the agent was the subscription of the principal." And again in *Trueman vs. Loder* (11 A. & E. 589) Lord Denman, C.J., says—"Parol evidence is always necessary to shew that the party sued is the party making the contract and bound by it, whether he does so in his own name or in that of another or in a feigned name; and whether the contract be signed by his own hand or by that of an agent are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop." The only case which was cited during the argument which in any way conflicts with these decisions is the case of *Humble vs. Hunter* (12 A. & E. 310). That was an action on a charter-party executed not by the plaintiff but by a third person who in the contract described himself as the "owner of the ship;" and it was held that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent. The judgments in the case were unconsidered, and certainly do not appear to me to be very convincing. The most satisfactory reason for the decision is that given by Patteson, J., where he says—"The plaintiff here must be taken to have allowed her son to contract in this form and must be bound by his act." In other words the plaintiff, having allowed her agent to represent himself as the owner and principal, was estopped from now denying that that was so. That principle, however, even if this decision in the face of the other authorities were held to be binding, would not be applicable in such a case as the present, where the principal is the defendant, inasmuch as the doctrine of estoppel would not under such circumstances come into operation. On the whole then, it seems clear that the English decisions upon this point are opposed to the contention raised by the defendant's first exception. The defendant's counsel, then, realising the difficulty in which he was placed, fell back upon the argument that the rule established by these decisions applied only to ordinary mercantile contracts such as charter-parties, broker's notes, &c., and could not be extended to such a formal, non-mercantile contract as we have to do with in the present case. Now I am bound to say that I have been unable to discover any ground for the distinction which he thus

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attempted to draw. As Lord Abinger said in the case of *Beckham vs. Drake*—"The law makes no distinction in contracts except between contracts which are and contracts which are not under seal." No doubt in the case of a contract under seal the principal could not in England sue or be sued by reason of the technical rule that only those persons can sue or be sued upon an indenture who are named or described in it as parties. That technical rule clearly cannot be imported into the present case, inasmuch as contracts under seal are not known to our law, and, even if they were, it is not pretended that this was a contract under seal. In support of his contention, however, Mr. *Frames* referred to the case of *Browning vs. Provincial Insurance Company of Canada*, L. R. 5 P. C. 263, where, in the judgment of the Privy Council, the following passage occurs:—"By the law of England, speaking generally, an undisclosed principal may sue and be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which without notice may exist against the agent." Now, although it is there stated that this rule applies to mercantile contracts, I do not understand that it was thereby intended to exclude contracts which are not mercantile. The case before the Privy Council was a case of a mercantile contract, and it was therefore sufficient for the purpose of the decision in that case to state what was the rule of law applicable to such contracts. No doubt the cases to which I have referred have been cases of mercantile contracts, and naturally that would usually be the class of cases in which such questions would arise. But I am unable to discover anything in the judgments in these cases which would restrict the application of the principle to such cases only, but, on the contrary, the reasoning is sufficiently wide to cover other cases also. And, curiously enough, the principle is not applicable to the most common of all mercantile contracts, namely, to bills of exchange, as was pointed out by Lord Abinger in the case of *Beckham vs. Drake*, in which case he says, "By the law merchant a chose in action is passed by endorsement, and each party who receives the bill is making a contract with the parties on the face of the bill, and with no other party whatever." But in any case, even



if this principle of law is to be somewhat restricted in its application, I see no ground for holding that it is not applicable to a contract like the present, which, if not falling under any of the usual classes of mercantile contracts, is, nevertheless, of the nature of a commercial transaction. On the whole, then, I come to the conclusion that according to the principles of the English law the contention made on behalf of the defendant cannot be sustained. The only difficulty which I feel on this part of the case is whether our law agrees with the English law on this point. Any doubt, however, which might have been raised in my mind on reference to some of the Roman-Dutch authorities, for instance, *Van der Keessel*, Th. 572, and *Voet* 17, 1, 9, is set at rest by the decision of the Supreme Court in the case of *Lippert & Co. vs. Desbats*, Buch. 1869, 189. That was an action on a charter-party entered into between the defendant, the captain of a French barque, and one Morris Speyer. It was alleged in the declaration that the said Morris Speyer had acted as the agent for the plaintiffs in entering into the charter-party, and the plaintiffs accordingly claimed the right to sue upon the charter-party. An exception was taken to the declaration similar to the first exception in the present case. On the argument on this exception a large number of authorities, both on the English and Roman-Dutch law, were quoted on both sides, and in the result the exception was overruled by the Court. The report in Buchanan does not give the text of the judgment, but the decision is in accordance with the English cases to which I have referred. And this case is in one respect a stronger one than the present, inasmuch as it is not the case of the principal being sued but of the principal suing, so that the doctrine of estoppel referred to in *Humble v. Hunter* was applicable. Moreover, the decision appears to be in direct conflict with the passage of *Voet* 17, 1, 9, to which I have already referred, where he says: "But certainly if the agent contracts in his own name, it would be necessary for him to cede his rights of action to his principal." Mr. *Frames* attempted to dispose of this case shortly on the ground that it was an action on a charter-party; but I have already pointed out that in our opinion this principle of law cannot be confined only to cases of

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mercantile contracts. And I think it is important to notice that the agent Morris Speyer was not the master of the ship who, even by the Roman law, by means of the *actio exercitoria*, could bind the owner, but that he was the agent of the merchant who shipped the goods. This case, therefore, which, as being a decision of the Supreme Court, is binding upon us, appears to me to have established that our law is in accord with the English law upon this point. And here I might also refer to a passage in *Story on Agency*, sect. 163, where he says: "It would seem that, in the modern nations recognising the civil law as the basis of their jurisprudence, the like action (*actio utilis*) will generally lie by or against the principal upon the contract of his agent; and that it is competent for the agent to contract in his own name directly, or in the name of his principal only. Such, certainly, is the law in Scotland and in France. In cases of this sort, where the agent contracts in the name of his principal, having due authority, the principal is directly bound and the agent is not (in general) personally liable. But if the agent makes the contract for his principal in his own name, he incurs a personal responsibility, although there is an accessorial obligation on the part of the principal." In a note to the above section, the learned author gives references to passages in *Pothier on Obligations* to the same effect. On the whole, therefore, we are of opinion that the defendant's first exception must be overruled. And this brings me to the second exception, which is virtually the *exceptio non qualificatæ personæ*, or, in other words, that the plaintiffs are not the proper persons to sue in this action. Now the action is brought for the specific performance of an agreement entered into between Lynch and the guarantors for a syndicate to be hereafter formed, so that, on the face of the agreement, the plaintiffs are not parties to the contract which is being sued upon. It does not, however, follow that they are on that account disentitled to sue in the action. For just as we have decided that the defendant, though not a party to the contract on the face of it, is liable to be sued on the ground that Lynch, in entering into the contract, acted as his agent, so also is it now open to the plaintiffs to shew that they are the proper parties to sue upon this con-

tract. What, then, are the facts and grounds upon which the plaintiffs base their claim? The grounds are set forth in the 10th paragraph of the declaration, in which it is alleged that "the said company upon its formation became entitled to all the rights and benefits to which the guarantors for the formation of the said company were entitled under the said agreement with the defendant." Now, if that be true, it is needless to say that the plaintiffs, as the legal representatives of the said company, are fully entitled to bring this action. But then it is not sufficient for the plaintiffs to allege that the company has become entitled to the rights and benefits of the guarantors; they must go further, and shew on the face of the declaration how they have acquired these rights and benefits. How, then, do they shew this? Paragraph 10 says "By reason of the premises (that is to say, by reason of the facts set forth in the preceding nine paragraphs) and as a matter of fact" the company has become so entitled. Now, in the first place, we may dismiss from our consideration the words "as a matter of fact." I am wholly at a loss to understand what significance the plaintiffs' counsel attach to those words or for what reason they were inserted; and it is, I think, undesirable that pleadings should be burdened with meaningless phrases of this description. We are left, then, to gather from the first nine paragraphs of the declaration how the company has acquired these rights. Now the material facts set forth in these paragraphs are as follows:—That the contract, which is the subject of this action, was made between the defendant and certain guarantors for a syndicate to be thereafter formed; that at the time it was contemplated and stipulated that these guarantors should form themselves into a company with limited liability, to be called the "Otto's Kopje Syndicate, Limited;" that thereafter the said guarantors and the defendant did form themselves into such a company; that Lynch, the defendant's agent, received 5000 vendors' shares in the said company as stipulated in the contract; that the said contract was incorporated in the articles of association of the said company; and that the articles of association were signed by the defendant and by his agent. And, as far as I can judge, the conclusion drawn from these

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facts is that the company, immediately upon its formation, stepped so to speak into the shoes of the guarantors, and thus became entitled to all their rights and benefits. If I am wrong in this statement of the plaintiffs' case, then they themselves are to blame for not having set forth their case more clearly; but if I am correct then, in my opinion, the plaintiffs' position is an untenable one. It is a well-established principle of law that persons cannot contract on behalf of a company which has not yet been formed, nor can such a contract become binding upon the company, nor can the company sue upon it by reason of ratification after the formation of the company. As authorities for these statements it is sufficient to refer to the cases of *Kelner vs. Baxter*, L. R. 2 C. P. 174; *In re Empress Engineering Co.*, 16 Ch. D. 125; *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16. As was stated by the late Master of the Rolls in the case of *In re Empress Engineering Co.*, "The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence; nor could it become binding on the company by ratification, because it has been decided, and it appears to me well decided, that there cannot be an effective ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence." The only difference that I can see between the present case and the cases to which I have referred is that in those cases the agents, who purported to act on behalf of the company, were very limited in number, consisting of one or two or three persons; whereas in the present case the guarantors, who must be regarded as the agents for the projected company, were many in number, and together with the defendant formed either the majority or the whole of the members of the company when it was subsequently registered. In principle, however, I do not see that this can affect the question. The number of the agents is of course immaterial, and it cannot be said that the company and the guarantors are really one and the same thing under different names. The company is a corporate body, consisting of a constantly changing collection of members, and the rights and liabilities



of this body can in no sense be said to be the sum of the rights and liabilities of the individual members thereof. Consequently we are justified in saying that this alleged contract between the defendant and the guarantors is not a contract between the defendant and the company. How, then, can the company sue? Clearly the acceptance by Lynch, as defendant's agent, of the 5000 shares in the company cannot give them the right to sue upon the contract, as that was merely in furtherance of the original contract between Lynch and the guarantors. Nor do I see how the signing of the articles of association by the defendant can entitle them to sue for specific performance of this contract, whatever rights of action it might give the company against the defendant, if he has been guilty of a breach of any of the articles of association. On this point I may also refer to the recently decided case of *Browne vs. La Trinidad*, 37 Ch. D. 1. This was an action against a company for the purpose, *inter aliá*, of enforcing an agreement entered into before the formation of the company between the plaintiff, B., and a trustee for the company, by which it was stipulated that the plaintiff should be a director, and should not be removable till after 1888. The 6th clause of the articles provided that the directors should adopt and carry into effect the agreement with or without modification, and that subject to such modification (if any) the provisions of the agreement should be construed as part of the articles. The agreement was acted upon, but no contract adopting it was entered into between the plaintiff and the company. The Court of Appeal held that, treating the agreement as embodied in the articles, still there was no contract between B. and the company that he should not be removed from being a director, the articles being only a contract between the members *inter se*, and not between the company and B. I would refer specially to the judgment of Cotton, L.J., at p. 13, where he shews that the agreement between the plaintiff, who was therein described as "the vendor," and the trustee for the projected company, although alleged to have been adopted and incorporated into the articles of association, was not such an agreement as to be binding on the company. In the present case it is not alleged, nor was it argued, as in

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the case of the Northumberland Avenue Hotel Co., that after formation of the company a new contract to the same effect as the old one had been entered into between the defendant and the company. It was, however, contended by the plaintiffs' counsel that the guarantors had ceded to the company all their rights under the agreement with the defendant, so much so that he said the guarantors had themselves lost the right of suing upon the contract. Now if such a cession had taken place, undoubtedly the company would be in a position to sue in this action ; but the difficulty that I feel is that no such cession is alleged to have taken place in the declaration. If such a cession had been alleged, the declaration would doubtless have been good, and it would then have become a question of fact at the trial as to whether there had actually been such a cession or not. Can we then gather from the facts set forth in the declaration that the plaintiffs do intend to aver that there was a cession ? We are clearly of opinion that we cannot do so. Had there been any such intention it would have been perfectly easy to express it. It was argued that the fact of the original contract being inserted in the articles of association was proof that the guarantors intended to cede their rights under the contract. Now doubtless that would be some evidence to prove that such a cession had taken place, but it certainly could not be held to be conclusive ; for the contract may have been inserted, as in the case of the Northumberland Avenue Hotel Company, under the mistaken belief that the original contract was binding upon the company. It was also urged that sect. 67 of the articles of association contained a cession of the rights of the guarantors to the company. I do not, however, think that sect. 67 was ever intended to effect such a cession, or that such an intention can be gathered from the language of that section. The object of that section evidently was merely to vest all rights of property, &c., belonging to the company in the trustees, so as to make them the legal representatives of the company. Moreover, the assignment in that section was made not by the original guarantors as such, but by the shareholders of the company. It was an ordinary proviso, such as we should expect to find in a trust deed, and does not purport to cede any contracts made by

the promoters or guarantors to the company. On the whole, then, I cannot see how we can come to any other conclusion than that the plaintiffs do not in their declaration base their claim upon a cession from the guarantors of their rights under the contract. There is only one other point to which I would shortly refer. The original contract provides that the lease shall be ceded to the nominee or nominees of the guarantors, and I would now merely point out that nowhere in the declaration is it alleged that the plaintiffs, in their capacity as trustees of the company, are such nominees; and in the absence of such an allegation it is difficult to see how they can now claim a cession of the lease. In the previous case of *Ablett and Another v. Lynch*, it was pointed out by the Court that the declaration in that case was bad, inasmuch as it did not allege that there had been any cession of rights from the guarantors, or that the guarantors had appointed the plaintiffs as their nominees in terms of the agreement. In the present case the declaration has been greatly elaborated, but the plaintiffs have again avoided alleging either of these facts, although the case on their behalf was argued upon the assumption that they were the cessionaries and nominees of the guarantors. If this assumption is correct nothing would have been easier than to have stated these facts simply and clearly in the declaration. But as the declaration now stands, inasmuch as it does not disclose any privity of contract between the plaintiffs and the defendant, and as it does not allege that the plaintiffs are cessionaries or nominees of the guarantors, we must again hold that the declaration is bad. The result is that the second exception taken by the defendant is sustained, and costs must follow the event.

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[Plaintiffs' Attorneys, KNIGHTS & HEARLE.  
Defendant's Attorneys, COGHLAN & COGHLAN.]

## COWELL vs. FRIEDMAN &amp; Co.

*Pauperies.—Negligence.—Contributory Negligence.*

*C. while riding along the road was knocked down by a runaway horse belonging to F. and sued for damages, alleging that the horse was known to be a restive animal, requiring careful management, that it was improperly and negligently harnessed and wrongfully and negligently allowed to escape from control. The defendant denied the alleged negligence, and pleaded that the accident was due to the plaintiff's own want of care and caution. It appeared that after the horse had been duly harnessed in the ordinary manner a bolt broke owing to a latent defect, in consequence of which the shaft became loose and struck the horse, which became frightened and escaped and so caused the accident. Held, that it had not been proved that the accident was due either to want of care on the part of the plaintiff or to negligence on the part of the defendant, or to vicious or mischievous propensities or conduct on the part of the horse, and that in these circumstances the action could not be maintained on the ground either of negligence or of pauperies.*

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The plaintiff in this action was the Deputy-Messenger of the Magistrate's Court at Beaconsfield, where the defendants were storekeepers. The plaintiff sued for £300 as damages for injuries caused by a horse belonging to the defendants. He alleged that the horse, which was known by the defendants to be "restive and unreliable and requiring great care and attention in its management and direction," was being driven by one of the defendants on August 6, 1887, when he wrongfully and negligently abandoned the management and direction of the said horse and the conduct of the vehicle to which it was harnessed and left them without guidance or control. Through the negligence of the defendants or their servants the shafts of the said vehicle were at the time of such abandonment as aforesaid loosely and improperly attached or affixed thereto. The horse thereupon escaped

and ran away at great speed along the road towards Kimberley, and violently collided with the plaintiff, who was at the time lawfully proceeding on horseback towards Dutoitspan at a moderate speed. By this collision, which the plaintiff, using due care and diligence, was wholly unable to avoid, he was thrown to the ground and his leg was broken, and he sustained other injuries and had suffered much pain, and had been disabled from attending to his occupation, and had incurred heavy medical and other expenses, and sustained great pecuniary loss. The defendants pleaded that such injuries as the plaintiff had actually sustained were due to accident beyond their control, and not attributable to negligence on their part. They further pleaded that such injuries were caused by the plaintiff's own want of due care and caution, which contributed to the accident and the consequent injuries and damage. The plaintiff joined issue.

From the evidence for the plaintiff it appeared that the defendants' store was situated on the main road between Kimberley and Dutoitspan, on the left side of the road going from Kimberley, and about sixty yards on the Dutoitspan side of a railway crossing. About the same distance on the Kimberley side of the crossing, and on the right side of the road, were certain offices belonging to the Beaconsfield Municipality. On the morning of the accident, the plaintiff was proceeding on horseback from the back of these offices towards the railway crossing, on his way to Dutoitspan. As he approached the crossing, and just as he was entering the main road, he was suddenly knocked down by the defendants' horse, which came through the railway gates, and which he had not seen or heard before the moment of the collision. The horse, which had its harness on, struck him below the knee, both horses fell, and the plaintiff between them, and his leg was broken. Mr. Cowie, one of the defendants, came up while the plaintiff was lying on the ground, sent for a doctor and promised to fully compensate him for his injuries. (Mr. Cowie subsequently gave a different version of this conversation, to the effect that he had merely expressed his sympathy for the plaintiff and endeavoured to console him.) Plaintiff from the time of the accident had been unable to attend to his occupation as Deputy-Messenger, which brought him in about

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£28 a month, and had to pay about £35 for doctor's bills and medicine, and had suffered much pain, and for some time was compelled to use crutches, and was still unable to walk without a stick. The plaintiff stated that the railway gates and signal-box prevented him, in the direction in which he was going, from seeing the horse approaching and so avoiding it, and on this point he was to some extent corroborated by a witness who had made a plan of the ground. He also described the horse as known to be dangerous and excitable, but the balance of evidence was distinctly against this assertion, and the point was abandoned by his counsel in arguing the case. Some evidence was also adduced by the plaintiff as to the manner in which the accident happened and the horse escaped, but this did not differ very materially from the fuller information subsequently given on this point by witnesses for the defence. The defence was to the effect that on the morning in question the horse, which was quiet and tractable and often driven by the son of one of the defendants, a boy about ten years old, was harnessed to a sort of low phaeton in a proper and careful manner. The shafts were attached to the vehicle by a socket and fixed with bolts, round which the traces were fastened. The vehicle was in good repair, and a few days previously, as the bolts were observed to be somewhat worn, new bolts had been supplied and other repairs effected by a local wagon-maker. The horse after being put in was driven round from the back yard to the front of the store by the defendants' servant, and to do this he had to make a detour round some adjacent buildings, and to drive a distance of over a hundred yards, and during this drive all went well. The defendant Friedman then got into the vehicle, accompanied by a friend, and, after seeing that the harness was all right, drove off towards Dutoitspan. Just as they reached the main road, from which the store stood a little distance back, and after they had proceeded some thirty or forty yards, Friedman noticed the right shaft trailing on the ground, and striking the leg of the horse, whereupon the animal began to kick. Part of the bolt at this time was seen to be loose in the trace. Friedman gave the reins to his companion and jumped down and tried to get to the horse's head. Just at this moment



the other shaft broke off, owing to the struggles of the horse, the vehicle tilted down on his flanks, and the man who had the reins was pulled out and fell to the ground, and before Friedman could get to his head the horse got away, dragging the right shaft with him, and galloped down the road and met the plaintiff. Two or three witnesses who saw the collision said that the plaintiff appeared to be endeavouring to stop or turn the horse, and a man who was employed at a tramway siding on the road, beyond the municipal buildings on the way to Kimberley, said that he saw the horse coming and heard the clattering of his hoofs and harness, and the shouting of those behind, and could not understand how the plaintiff, who was much nearer, could have failed to hear and see the horse as he approached. The coachbuilder, who had supplied the new bolts, expressed his opinion that the accident must have been caused by a latent flaw in the one which gave way, its breaking being probably occasioned by a jolt.

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*Guerin*, for the plaintiff, contended that there was proof of negligence on the part of the defendants or their servants, firstly, in not harnessing the horse properly, and seeing that the shafts were securely attached, and the bolts in good order; secondly, in not preventing the animal from getting away when the shaft broke. The occurrence of an accident of this kind involved a presumption of negligence, which the defendants had failed to rebut: *Scott vs. London and St. Katherine's Dock Co.*, 3 H. & C. 596; *Packman vs. Gibson Bros.*, 4 H. C. 410. There was nothing to shew contributory negligence on the part of the plaintiff, who had exercised ordinary care. In reply to the Court, he stated that he did not contend that the defendants were liable independently of proof of negligence.

*Hopley, C. P.*, for the defendants, referred to *Moffatt vs. Bateman*, 3 L. R. P. C. 115, where *Scott vs. London and St. Katherine's Dock Co.* had been distinguished. It was there held that "there was nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and therefore no *prima facie* presumption of negligence was raised by such an accident

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occurring." The accident in this case also had occurred through the breaking of a bolt, and the Court observed that "it is very unlikely that the appellant before going out for a drive or using the buggy would examine very strictly and carefully what was its state with regard to its bolts and fastenings, or that he could fairly be accused of negligence for not having done so."

LAURENCE, J., stated that the Court was of opinion that the plaintiff had failed to prove negligence, but inquired whether, independently of negligence, the facts proved did not amount to *pauperies*, for which the defendants would be liable, and referred to *Voet*, IX. 1, and the judgment of SMITH, J., in *Le Roux vs. Fick*, Buch. 1879, 29.

*Hopley, C. P.*, said that was not the plaintiff's case, which both on the pleadings and in the evidence and argument had been confined to the question of negligence.

LAURENCE, J., said that, if the case was one of *pauperies*, the allegations of negligence in the declaration might be dismissed as surplusage, but, as the question was an important one, and counsel were not prepared with authorities on the subject, it would be better to postpone the case for further argument.

*Postea* (Feb. 21),—

*Guerin*, on the law of *pauperies*, referred to *Le Roux vs. Fick*, Buch. 1879, at p. 37; *Dig.* IX. 1, 7, 14; *Voet*, IX. 1, 5; *Van Leeuwen*, tr. Kotze, 323, 324 and note *in loc.*; *Storey vs. Stanner*, 1 H. C. 40; *Spires vs. Scheepers*, 3 E. D. C. 173; *Grier vs. Miller*, S. C., reported in *Cape Times*, August 23, 1887. He contended that this was not a case in which the owner could escape further liability by giving up the animal which had caused the damage; if the horse had been irritated by a third person, the owner would not have been liable, but in the absence of such *concitatio* he was responsible for the damage caused. As to contributory negligence, the defendant would be liable for *pauperies* caused by his animal, unless he could shew gross carelessness or negligence on the

part of the plaintiff, of which there was no evidence in the present case.

*Hopley, C. P., contrà*:—The latest reported case bearing on this question is that of *Spires vs. Scheepers, ubi suprâ*, where BUCHANAN, J., in giving the judgment of the Court, said: "As was pointed out by the JUDGE PRESIDENT during the argument, the liability of owners of animals for injuries done is founded on the doctrine of *culpa* or negligence." An owner is doubtless responsible if he keeps an animal with vicious propensities which does mischief; but if the injury is one for which the animal cannot be blamed, then the owner is not liable. This was not "such an act as the animal might naturally have been expected to commit," in the words of SMITH, J., in *Le Roux vs. Fick*, at p. 33, quoted by LAURENCE, J., in *Storey vs. Stanner*, at p. 48. He referred to *Gaius*, III. 211; *Inst.* IV. 3, 8; *Domat's Civil Law*, Part I., bk. II., 8, 2, par. 1564–1566; *Merlin, Répertoire*, s. v. '*Animaux*,' *sub fine*, p. 225. The present was a case of *damnum casu datum, nulla cuiusquam culpa* (*Voet*, IX., 1, 5). The conduct of the horse was contrary to his nature, and such as the owner could neither anticipate nor prevent. In any case the plaintiff could not recover as there had been negligence on his own part, and the evidence shewed that if he had used his eyes and ears he would not have been hurt.

*Guerin* replied.

*Cur. adv. vult.*

*Postea* (March 8),—

LAURENCE, J., said:—On Saturday, August 6, 1887, at about eleven o'clock in the forenoon, Mr. J. W. Cowell, the Deputy Messenger of the Magistrate's Court at Beaconsfield, left the Court house at that place, being on horseback, and proceeded towards Dutoitspan. The Court house stands on the Market Square some distance on the right of the main road, going from Kimberley to Dutoitspan. By the side of the road, and also on the right, are erected certain offices belonging to the Beaconsfield Municipality; and Mr. Cowell on his way from the Court to the road passed round the

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back of this building. As he turned the corner of the building he was a few feet from the road, and on a somewhat lower level, and about thirty yards in front of him was a railway crossing, with gates at this time open to the road, a signal-box by the line and another small building on the further side of it. Just as he got into the main road, at a point about twenty yards on the Kimberley side of the crossing, he came into collision with a runaway horse. Cowell was going at a moderate pace—as he puts it, at a sort of half trot—and the runaway horse met him at full gallop, and he only saw the animal almost at the instant of the collision. The horse collided against him with such violence that he was thrown to the ground and his leg was broken. In consequence of this accident he suffered much pain, was confined to his bed for a considerable time, has only recently sufficiently recovered to walk with the aid of a stick, is scarcely yet able to ride, and has been unable for several months to pursue his vocation as Deputy Messenger. For these injuries he sues the defendants, the owners of the horse which caused them, for £300 as damages, and he states that his actual expenditure on doctor's and chemist's bills, and his loss of earnings to date of action amounted to about £135. The question we have to decide is whether the defendants are bound to compensate him for the damage he has undoubtedly sustained.

The plaintiff's case is (1) that the horse was, to the knowledge of the defendants, "restive and unreliable, and required great care and attention in its management and direction;" (2) that the horse having been harnessed to a spider was being driven by the defendant Louis Friedman, when he wrongfully and negligently abandoned its control, management and direction; (3) that at this time through the negligence of the defendants or their servants the shafts of the vehicle were loosely and improperly attached or affixed thereto; (4) that by reason of this improper and defective condition of the shafts, and of Friedman's negligence as aforesaid, the horse escaped and collided with the plaintiff and caused him the damage complained of, the plaintiff on his side using due care and diligence and being wholly unable to avoid the said collision. The defendants



in their plea, after denying the amount of the damage claimed, proceed to deny all the allegations of negligence and say that the injury was the result of a pure accident, and further plead that it was the result of contributory negligence on the part of the plaintiff, and was caused by his own want of care and caution.

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Now the case is not one in which I think it necessary to minutely examine or review the evidence. It is sufficient on this branch of the case briefly to express the conclusions at which, after giving due consideration to the facts proved, we have arrived. Undoubtedly the defendant's horse got loose from the vehicle to which he was harnessed and ran away and caused the plaintiff damage; and I should have been rather disposed to hold that these facts in themselves created a *prima facie* presumption of negligence, which it was the duty of the defendants to rebut. I should have been disposed to take this view on the authority of the well-known case of *Scott vs. London and St. Katherine Docks Co.*, 3 H. & C. 596, referred to by the Supreme Court in *Gifford vs. Table Bay Dock and Breakwater Management Commission*, Buch. 1874, at p. 120, and by this Court in the recent case of *Packman vs. Gibson Bros.* In that case, to quote once more the often cited passage from the judgment of Erle, C.J., it was held that "where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." On this point I might also refer to the recent case of *Whitby vs. Brock & Co.*, in the Court of Appeal, reported in the *London Times* of January 25. The plaintiff had been injured by some fireworks at the Crystal Palace during a pyrotechnic exhibition managed by the defendants. The jury having found a verdict for the plaintiff, Grantham, J., entered judgment for the defendants on the ground that there was no evidence of negligence on their part. This judgment was however reversed, and the verdict of the jury restored by the Court of Appeal, Lord Esher, M.R., remarking that "the mere fact that the fireworks struck



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the plaintiff was sufficient *primâ facie* evidence of negligence, because fireworks do not ordinarily strike the spectators and bystanders." Strong however as these authorities appear to be, it is difficult to regard them as applicable to the present case in the face of the decision of the Judicial Committee of the Privy Council in the case of *Moffatt vs. Bateman*, 3 L. R. P. C. 115, to which we were referred by counsel, and which was also mentioned by the CHIEF JUSTICE in *Gifford's Case*. *Moffatt vs. Bateman* was a case of a carriage accident, and the Privy Council held that while the falling of loaded bags out of a warehouse on a person below—I suppose I may now add the falling of a firework—was not in the ordinary course of things, on the other hand "there was nothing more usual than for accidents to happen in driving without any want of care, and therefore no *primâ facie* presumption of negligence having been raised" it was necessary for the plaintiff to give affirmative evidence of such negligence as in the circumstances of the case would render the defendant liable.

Now in the present case we stopped the *Crown Prosecutor* almost at the outset of his argument on the question of negligence, and expressed the opinion that it had not been proved. I would not go so far as to say that the case was one in which at *nisi prius* it would have been the duty of the Judge to direct the jury that there was no evidence of negligence; but as a juror I do not find negligence to have been proved. If the case was one in which the mere fact of the accident happening raised a *primâ facie* presumption of negligence, I think the presumption has been rebutted; if, following the above expression of opinion in *Moffatt vs. Bateman*, we hold that the burden of affirmative proof is on the plaintiff, I think he has failed to give such proof. The allegation that the horse was and was known to be a restive and dangerous animal was abandoned by the plaintiff's counsel at the trial. I think he felt that after the members of the Court had seen the animal—which appeared to submit with great meekness and equanimity to a severe scrutiny, as he stood in harness, by the Court, counsel, attorneys, and a large number of persons interested in the case—they were unlikely to come to the conclusion that he was so "restive

and unreliable" as alleged in the declaration and by the plaintiff in his evidence. But it is said that there must have been negligence in the inspanning, or otherwise the bolt by which the shafts were fastened in the socket would not have given way, and it would have been discovered that it was either defective or loosely fixed. The evidence, however, shews that the horse was duly and carefully harnessed in the usual manner, that the vehicle was in good order, and had been quite recently put in thorough repair, and in particular that new bolts had been put in only a few days before the accident. Now in *Moffatt vs. Bateman* Lord Chelmsford said: "With regard to the proof of negligence by the admission of the appellant that he had not examined the vehicle and discovered the defective state of the kingbolt, their Lordships are of opinion that this amounts to no proof whatever of negligence. It appears that the carriage was regularly examined by a blacksmith every three months, and it is very unlikely that the appellant before going out for a drive or using the buggy would examine very strictly and carefully what was its state with regard to its bolts and fastenings, or that he could fairly be accused of negligence for not having done so." As to the condition of the vehicle and its fastenings, the evidence in the present case is even stronger in favour of the defendant than that for the appellant in *Moffatt vs. Bateman*, and therefore the allegation of negligence under this head must also be dismissed. Then, there being no fault to find with the horse and no fault to find with the vehicle, what was the cause of the accident? This is not positively proved, but I think all the probabilities are in favour of the explanation given by Powell, the blacksmith, who says that one of the new bolts must have had a latent flaw, as does sometimes happen, which caused it to give way. The evidence is that immediately after the shaft got loose, and struck the horse, part of the bolt was observed to be loose in the trace which had been fastened round it. It appears that after the horse had been inspanned in the back yard—for on this point we must accept the evidence of Bredekamp and Johannes, for the defence, rather than that of the plaintiff's coolie witness Narien Sam—it had to be driven round, a distance of over a hundred yards,

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to the front of the defendant's store, and during this drive, which seems to have been over level ground, all went well; but after Friedman set off on his journey he had to cross what, after an inspection of the *locus in quo*, I think I may describe as rather an awkward sluit in order to get into the main road; and it seems to have been just at this point that the accident happened, and for my part I feel little doubt that it was the jolt in crossing this sluit which caused the defective bolt to break and the shaft to fall. Up to this point, therefore, there was no negligence; was the defendant then negligent as alleged in allowing the horse to get away? If the horse escaped through his want of skill or want of strength, that, on the authorities to be subsequently examined, might amount to *culpa* or negligence, for which he would be liable; but I do not think such *culpa* has been proved in the present case. Friedman had with him a companion, a Mr. Siew, who no doubt did his best to help him to control the frightened horse; but the evidence shews that the horse when frightened by the one shaft falling managed to break the other, and then there were no means of controlling him, and Friedman, though he did his best, failed to get to his head in time to prevent his escape. The defendant when driving his horse was not bound to have any one with him, and if, though happening to have such assistance, he was unable to prevent the escape, I see no reason to believe that one man unaided, of average strength, skill and capacity, could have prevented such escape. The case for the plaintiff under this head therefore also fails; and for these reasons we are of opinion, as already intimated, that the plaintiff has not succeeded in shewing that the accident arose from the negligence of the defendants, or of either of them, or of the servants they employed.

Before leaving the question of negligence, I wish to say a few words with reference to the defendants' plea that, even if there was negligence on their part, the real cause of the accident was contributory negligence on the part of the plaintiff, exempting them from liability. Now, as a general rule, where the plaintiff has failed to prove negligence, it is unnecessary to examine a plea of contributory negligence; but in the present case, in view of certain eventualities, I

think it desirable to consider this plea and the evidence in support of it. The question is mainly one of fact, and one upon which I have derived some assistance in forming my opinion from an inspection of the *locus in quo*. The *Crown Prosecutor's* argument was really to the effect not that there was contributory negligence by the plaintiff, but that the collision and the resulting damage were really entirely attributable to his own negligence and, as it was put, that it would not and could not have happened if he had kept his eyes and ears open. I confess that on this point I have felt some difficulty. In view of the evidence of the witnesses for the defence it is certainly strange that the plaintiff, as he says, never saw or heard the runaway horse till the moment of the collision. This is especially strange in view of the evidence of Kelly, who, however, is a younger man, and may be a man of naturally acuter perceptions than the plaintiff, and who, as pointed out by the plaintiff's counsel, was in some respects in a better position for noticing the horse's approach, as he, though rather further off, was standing down the road in a straight line, while the plaintiff was approaching it at an angle and from a lower level. It must also be borne in mind that from the escape of the horse to the collision only a very few seconds elapsed—according to a rough calculation made during the argument somewhere about twelve seconds—and during this short space of time, as the plaintiff approached, I am satisfied from an inspection of the locality that, as stated by Mr. Dale, the plaintiff's view in the direction the horse was coming was partially obstructed by the railway gates and signal-box. At one moment he may have looked ahead just as he approached the road, and owing to this partial obstruction may have seen nothing, though it is certainly remarkable that he did not hear the noise and clatter of the hoofs and harness; at the next moment, it was too late for him to avoid the collision. The plaintiff was where he had a right to be, going on his lawful business at a reasonable and ordinary pace; it is probable that if he had kept a sharp look-out he might have managed to avoid the collision; but I do not think it has been proved that he failed to exercise what in his situation was a reasonable and average degree of care; and it

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does not appear to me that the mere absence on his part of that amount of quickness of perception, of agility and adroitness, which in the circumstances of the case was necessary to avoid the accident, constituted such a state of facts as to amount to what the law regards as contributory negligence. According to the author of a recent text-book, in order to establish contributory negligence, "the defendant has to shew, first, that the plaintiff has been negligent in respect of the matter complained of, and might have avoided the consequence of the defendant's negligence: secondly, that his negligence has been of such a character that the defendant could not avoid its effects." He goes on to say: "It may seem that there are some cases in which the second proposition can scarcely be said to be in issue. Where the defendant does an act the consequences of which are beyond his control, as if he leaves a cart in the street, and the horse runs away, and the plaintiff carelessly is driving on the wrong side of the way, it is obvious that the defendant cannot avoid the effects of the plaintiff's negligence in point of fact, but it is his own fault that he has disabled himself from doing so, and he must be held liable. If the defendant's negligence is of such a character that he has deprived himself of his power of avoiding the plaintiff's negligence, that is equivalent to his being able to avoid it and negligently omitting to do so. . . . Suppose the defendant, sitting in his trap, negligently tied his reins to it, and fell asleep, and his horse started off; the plaintiff negligently was playing at pitch and toss in the street; the defendant, having awoke, could by ordinary care avoid running over the plaintiff, but he was too idle to untie the reins. The defendant is liable; but could it be contended that he would be less liable if he had deprived himself of the power of exercising care in the first instance by letting the reins lie upon the horse's back? Clearly he would be liable, although as a matter of fact he could not avoid the plaintiff's negligence, having put it out of his power to do so." (*Smith on Negligence*, pp. 153-155.)

Having then found that this accident was not attributable to negligence on the part of either the plaintiff or the defendants, the important question still remains whether the defendants, independently of negligence on their part, are



liable for the damage or, as the French would say, the *dégât*—one cannot, strictly speaking, say the injury—caused by their animal. It was contended on their behalf that, both in the declaration and in the evidence and argument, the case for the plaintiff had been entirely based on the allegation of negligence and it was therefore submitted that, in the absence of negligence, they were at all events not liable in the present action. If, however, the damage without negligence was itself in the circumstances of the case actionable, the allegations as to negligence may be dismissed as surplusage, and the facts as set forth will still be sufficient to justify the Court in drawing the legal conclusion of the defendants' liability, and the most that could be said is that the failure to prove the alleged negligence might influence the question of costs. In the case of *Le Roux vs. Fick*, Buch. 1879, 29, at p. 41, where there were allegations of viciousness on the part of the animal and negligence on the part of the owner, SMITH, J., said: "In the summons in the present case there are several allegations that have not been proved. They were doubtless inserted to make it good on the face of it, whatever view were taken of the law. In the view that I have taken the summons shews a good cause of action independently of these allegations which may be regarded as surplusage." So in the present case, if there is a good cause of action irrespective of the allegations of negligence, the fact of their insertion in the declaration will not debar the plaintiff from recovering. Whether such an action will lie on the facts of the case is the question which I now proceed to examine.

I have just incidentally referred to the judgment of Mr. Justice SMITH in *Le Roux vs. Fick*. It may be described as the classical judgment in our colonial reports on the law of *pauperies*; it was expressly approved by the CHIEF JUSTICE in *Drummond vs. Scarb*, Buch. 1879, 8; it is in entire accordance with the decision of the Supreme Court in the earlier case of *Perfonteyn vs. Petersen*, Buch. 1876, 103; and it has always been cited as authoritative in the subsequent cases, such as *Storey vs. Stanner*, 1 H. C. 40, and *Spires vs. Schoepers*, 3 E. D. C. 173. If that judgment altogether covered the present case, there would be no more to be said:

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but, although great assistance is to be derived from it, I do not think it does so, both because there is a considerable difference in the facts, and also because the *dicta*, so far as they bear on the case now before us, are to a certain extent and at all events *primâ facie* ambiguous. Thus, referring to the general principle, *Sic utere tuo ut alienum non lædas*, the learned Judge said, at p. 33, in a passage which the reporter has embodied in his head-note, and which I myself cited in *Storey vs. Stanner*: “A man has a right to keep any animal, but if that animal causes damage to any person who is where he has a right to be, then the owner of the animal, it seems to me, ought to be held responsible for the damage, if it was caused by the animal committing such an act as he might naturally have been expected to commit, and if the committing of the act was not brought about substantially through the fault of the person damaged.” But later on, after examining the Roman law, he makes, at p. 37, a somewhat wider statement, and, without any qualification as to the damage being such as the animal might be expected to commit, he says: “The result of the law *si quadrupes* and of the ædilitian edict and of their extension by means of *utiles actiones* seems to have been that an action *de pauperie* lay in all cases of damage caused by animals where the damage was not brought about through the fault of the party using the animal or of some third party;” and he proceeds after a careful investigation of the subject to express the opinion that, with certain exceptions with regard to the measure of damages, there was no material difference between the ancient civil and the modern Roman-Dutch law. Adopting this view, I said in *Storey vs. Stanner*: “By the ancient and modern civil law, and by the present law of this Colony, the owner of a dog or other dangerous animal is responsible for injuries or *pauperies* committed by that animal, irrespective of any question of *scienter*, provided there is no negligence or improvidence on the part of the person injured, or other impropriety of conduct on his part which directly caused or mainly contributed to cause the injury.” It must however be borne in mind that both *Storey vs. Stanner* and *Le Roux vs. Pick*, as well as the other cases in which owners have been held liable in our Courts for the

acts of their animals--namely *Sheard vs. James*, Buch. 1876, 101, *Perfonteyn vs. Petersen*, *ibid.* 103, and the recent case of *Grier vs. Miller*, in the Supreme Court, as yet unreported—have all been cases of damage caused by dogs, that is by animals which though domesticated are sometimes dangerous, and they have been cases of damage occasioned by the animal so to speak intentionally and viciously, and in the indulgence of a propensity analogous to what in a rational being would be termed injurious. The question has still to be decided whether the law of *pauperies* covers damages caused by a horse in circumstances such as the present. To determine this question, I have thought it well to follow the maxim, *melius est petere fontes quam sectari rivulos*, and I therefore proceed to an analysis of this branch of the Roman law, after which it will be necessary to consider the opinions expressed by more recent authorities on the same subject.

According to the Twelve Tables—Table VIII., sect. 6 (*cf. Ortolan, Législation Romaine*, 10th Ed., 1, 115)—if damage, or *pauperies*, was caused by a quadruped, the owner had to make good the damage or surrender the animal. SI QUADRUPES PAUPERIEM FAXIT, DOMINUS NOXÆ RESTITUTIAM OFFERTO, SI NOLIT, QUOD NOXIT DATO. It is said that there was a special law to the same effect with regard to dogs, referred to by *Paulus* (Sent. 1, 15, 1) as the *Lex Pesulania*. Concerning this *Lex Pesulania*, however, there has been much dispute, and *Cujacius* conjectured, and his conjecture has been adopted by *Pothier*, that what *Paulus* wrote was *Lex Solonia*, referring to an enactment attributed to *Solon* by *Plutarch*: "Ἐγραψε δὲ καὶ βλάβης τετραπόδων νομον, ἐν ᾧ κύνα δακόντα παραδόναι κελεύει κλειῶ τετραπύχει δεδέμενον." Heineccius in his *Syntagma* disapproves of the conjecture of *Cujacius*, observing: "Sane vocabuli terminatio magis Romanam quam Atticam legem videtur indicare. Quis unquam Solonis leges vocavit Solonias? Et cur *Paulus* in libro, quo prima iuris Romani elementa complexus est, legem quandam Græcam adduxisset? Si recte se habet scriptura ac non potius *Pesulania* vel alio modo

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scriptum fuit, verisimilius est, Pesulanum quemdam, quisquis is demum fuerit, tribunum plebis, speciatim de cane sanxisse, quod lex XII. Tabularum generatim de quadrupedibus sanxerat, adeoque legem Pesulaniam plebiscitum quoddam esse, cuius tamen auctorem æque ac ætatem scimus iuxta cum ignarissimis. Sane ob daninum quoque a canibus datum competebat noxalis actio, si canis solutus fuisset, quod procul dubio Pesulania illa lege primum invecum est." The weak point in Heineccius's argument seems to be that no such *plebiscitum* was required, as dogs would fall within the general category of quadrupeds and thus within the already existing law of the Twelve Tables; but whether he or Cujacius is right, and whether or no an enactment to this effect existed at Athens as well as at Rome, is of course a matter of purely antiquarian interest, upon which perhaps I should apologise for digressing. The law of the Twelve Tables in any case remained in force; it was supplemented in some respects by the ædilitian edict, which may be described as a sort of municipal bye-laws, by the Lex Aquilia, and by the equitable jurisdiction of the Prætor, and thus a body of law on this subject grew up, and is embodied and expounded in the legislation of Justinian, to which I now proceed.

Taking first the Institutes, the law is set forth in Book IV., Tit. IX., pr., to which there appears to be nothing precisely corresponding in the older institutional work of Gaius. I may quote the excellent though somewhat free translation of Mr. Moyle, Vol. II., p. 192, whose note on the text, Vol. I., 564, 565, may also be usefully compared. Justinian says:—"A noxal action was granted by the statute of the Twelve Tables in cases of mischief done through wantonness, passion or ferocity by irrational animals; it being by an enactment of that statute provided that if the owner of such an animal is ready to surrender it as compensation for the damage he shall thereby be released from all liability. Examples of the application of this enactment may be found in kicking by a vicious horse, or goring by a bull with a propensity to toss; but the action does not lie unless in causing the damage the animal is acting contrary to its natural disposition; if its nature be to be savage, this remedy is not avail-

able. Thus, if a bear runs away from its owner and causes damage, the *quondam* owner cannot be sued, for immediately with its escape his ownership ceased to exist. The term *pauperies*, or 'mischief,' is used to denote damage done without there being any wrong in the doer of it, for an unreasoning animal cannot be said to have done a wrong. Thus far as to the noxal action."

With regard to the statement that if the animal is by nature savage, this remedy is not available, and the somewhat subtle reason assigned for it, it will at once occur to the reader that it appears to be in rather singular contrast with the well known illustration in the leading case of *Fletcher vs. Rylands* (3 H. L. 330), the illustration I mean of "the dangerous beast," for damage committed by which, if permitted to escape, it was stated, as a matter of course, that the owner would be responsible. I remember also reading a report of a case tried at *nisi prius* not long ago, I think before Huddleston, B., in which the owner of a menagerie was held responsible for damage done by a bear who put his paw through a cage to which a visitor had incautiously too closely approached; and in the case of *Whitby vs. Brock*, referred to above, it is stated that Lopes, L.J., in the course of the argument asked, as a sort of *reductio ad absurdum* of the defendant's argument, whether a visitor to the Westminster Aquarium must be held to take his chance of the wolves, which are exhibited in that place of amusement, making their escape? Thus at first sight in this respect the English law would appear to be less favourable to the owner than the civil law; but it must be remembered that in this section Justinian is merely expounding the nature of the old noxal action of the Twelve Tables, which was subsequently extended by the aedilician edict, as shewn in the following section, to the keeping of dangerous animals near a public road; and the writer adds, *præter hæc autem aediliciæ actiones et de pauperie locum habet*: upon which Mr. Moyle remarks (i. 565, note):—"Though many are for rejecting this as bad law, it seems better to say that the *actio de pauperie* was available at any rate in the case of an animal which, though by birth *feræ naturæ*, no longer enjoyed its natural liberty, but was in some degree tamed or domesticated, and so in

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doing injury might be said to be acting 'against its nature.'"  
 If this view of the civil law is correct, its rule as to the liability of the owner of such animals would appear to be in substantial accordance with that of the English law. If we turn to the fuller discussion of the subject contained in the Digest (IX. 1), we find the same proposition laid down—namely, that the owner is responsible when the mischief is done by his beast acting contrary to his nature. *Et generaliter*, it is said, *hæc actio locum habet quotiens contra naturam fera mota pauperiem dedit*. Now the question arises how this statement of law is to be reconciled with the *dictum* of SMITH, J., that the owner is liable for the damage, "if it was caused by the animal committing such an act as he might naturally have been expected to commit." At first sight the two statements seem in diametrical conflict with one another. From one point of view indeed Mr. Justice SMITH's proposition might be reconciled with the other authorities by supposing that he was referring to the special class of cases discussed by Voet, and to be referred to later on, where animals may be held, in his view, to commit at all events a sort of *quasi pauperies* when acting *secundum naturam*—e.g., when cattle or sheep stray and graze upon the pasture lands of some one other than their owner, and where they have no right to feed. It seems clear however from the context, and from the facts before him, that the learned Judge in this passage was dealing with the subject generally, and not with reference to this particular class of cases, of which he in a subsequent passage makes special mention. On the whole it seems to me that this apparent conflict must be reconciled in the following manner. When Justinian in the Institutes and Digest refers to damage done *contra naturam*—the passage in the Institutes *in eis quæ contra naturam moventur* is rather loosely translated by Mr. Moyle "when the animal is acting contrary to its natural disposition"—he refers to the nature not of the particular animal but of the *genus* or class of animals to which he belongs. When Mr. Justice SMITH speaks of "such an act as he might naturally have been expected to commit," he is referring to the nature or idiosyncrasy of the particular member of that *genus* which has done the mischief. If this

distinction is correctly taken, the damage, to constitute *pauperies*, must be *contra naturam huius generis quadrupedum, sed secundum indolem huius quadrupedis*. Horses and oxen for instance may be regarded as domesticated animals *mansuetæ naturæ*, whose nature is to serve man and not to do him a mischief; but you may find here and there *equus calcitrosus* or *bos cornu petere solitus*, an animal which, contrary to the habits of its kind, has vicious or malevolent propensities, and the mischief resulting from its indulgence in such propensities, whether its owner is or is not aware of their existence, constitutes *pauperies* for which he is responsible. This, as I understood, was substantially the position taken in argument by the *Crown Prosecutor*; and I think an analysis of the illustrations given in the Digest tends strongly to support it, so far at least as the civil law is concerned. Thus, Servius is cited as laying down that the action lies when a quadruped has done mischief *commota feritate*—the Institutes say *lascivia aut ferores aut feritate*—and the instances are then given of a horse apt to kick, an ox apt to gore, or of mules which *propter nimiam ferociam* have done some mischief. Then cases are mentioned in which the damage was caused not by the vice of the animal, but by the *culpa* or negligence of his owner or the person in charge, in which case there would be no *pauperies* but an action would lie *damni iniuriæ*. Then there is the case of a dog whom his master or other person in charge of allows to break loose and do mischief; the person in charge will be liable for not taking proper precautions to control the animal, or for taking charge of an animal which he is not strong enough to control. If an animal is provoked into doing damage—*si instigatu alterius fera damnum dederit*—this is not *pauperies*. The damage is the result not of the vice of the animal but of the provocation given to it. This proposition is illustrated, with regard to horses, in two ways. *Si equus*, we read, *dolore concitatus calce petierit, cessare istam actionem, sed eum qui equum percusserit aut vulnervit, in factum magis quam lege Aquilia teneri, utique ideo, quia non ipse suo corpore damnum dedit*. "If a horse when irritated by pain gives a kick, this is not a case of *pauperies*, but against him who struck or hurt the horse there lies an action, but rather *in factum* than under the *Lex Aquilia*, since he

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did not directly with his own person damage the plaintiff." I have followed the reading in Mommsen's text, *dolore concitatus*; but there is another reading *dolone concitatus*, adopted by Gothofred, here and in IX. 2, 52, and which the following words—*qui equum percusserit aut vulneraverit*—rather tend to support. Of the *dolon* an explanation is given by Servius on Verg. *Æn.* VII. 664:—

*Pila manu savosque gerunt in bella dolones.*

It is said to have been "a pin or piece of wire fastened into the lash of the whip." But whether we read *dolore* or *dolone* the sense is much the same; for a horse to turn restive when in pain, however caused, is not *contra* but *secundum naturam*, and therefore any damage which ensues is not *pauperies*, but is damage for which a special action lay against the person who annoyed the horse. The second illustration given is that of a person kicked by a horse which he is fondling or stroking. In this case the action lies, for such cajolment is not provocation, and the mischief results from the vicious disposition of the animal. How then if the *damnum* is the result neither of wanton irritation, where the action does not lie, nor of bad temper on the part of the animal, where it does, but of fright or alarm produced without any one's fault? It is difficult to see on principle why this should any more amount to *pauperies* than the case mentioned in the first illustration, or why the owner should be held responsible when no one is to blame any more than when a stranger is to blame. Suppose a horse is stung by a horse-fly in a sensitive part and becomes uncontrollable and does a mischief; or to take the cases of unavoidable accidents, mentioned by *Addison*, where the owner has been held by the English Courts not responsible, "where a horse, being frightened by a clap of thunder, ran away with the defendant, and knocked down the plaintiff; also, where a horse, being frightened by the noisy and rapid approach of a butcher's cart, furiously driven, became ungovernable, and ran against and killed another horse, notwithstanding all the efforts of the defendant to control the animal" (*Gibbons vs. Pepper*, 1 Ld. Raym. 38; *Wakeman vs. Robinson*, 1 Bing. 213; *Addison on Torts*, 4th ed. 418). Suppose in the first of the above illustrations from the

Digest we read *dolore*, why should *concitatio* caused by a falling shaft produce *pauperies*, when *concitatio* caused by the application of a goad has no such effect? Or if we read *dolore*, can it be material so far as the owner is concerned whether the pain is deliberately or accidentally produced? The principle suggested by these illustrations is confirmed by those which follow. The next case given in the Digest is that of one animal inciting another to do damage. It is the owner of the provoking animal, not of the animal which is provoked, who must be held liable:—*Si alia quadrupes aliam concitavit ut damnum daret, eius quæ concitavit nomine agendum erit.* Thus, if A.'s horse kicks B.'s horse, and B.'s horse then lashes out and kicks C., C.'s action will lie not against B. but against A., his horse being vicious while that of B. was *dolore concitatus*. Lastly, passing over the case of wild animals, we come to rather a curious illustration which also points to the same conclusion. Suppose two rams or two bulls have a fight, and one kills the other, does the action of *pauperies* lie? Scævola, a contemporary of Cicero's, the first man who wrote a systematic treatise on the civil law, and the earliest lawyer whose writings were used in the Digest, where he is cited as "Quintus Mucius" (cf. Roby's *Introd.* cv.-cviii.), dealt with this case by drawing a distinction. If the animal who was killed was the aggressor, there was no action; if he was provoked by the other, the action lay. Here again we have the same principle. If the animal only acted in self-defence, there is no liability; but if the *damnum* was the result of his vicious conduct, the owner was responsible for the viciousness of his beast. Once more, we have a case put by Alienus. A stable boy was leading a horse, the horse snuffed at a mule, the mule lashed out and broke the boy's leg. It was held that the owner of the mule could be sued for *pauperies* (Dig. IX. i. 5). The *effactus* by the horse was like the *periculsio* or *palpatio* referred to above, or merely a "delicate attention" which could not be held to have provoked or justified the kick.

The result appears to be that according to the civil law the owner is liable for damage arising from the vicious conduct or intractability of his animal, but not for damage which the animal so to speak has innocently caused. As

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*Voet* puts it, discussing the case of the bulls or rams fighting, *cum et in brutis quædam iuris similitudo sit, atque adeo moderaminis inculpatæ tutelæ simulacrum probatum*. This result, arrived at from a study of the original sources, appears to be strongly confirmed by the views expressed by the modern commentators. Thus Mr. Hunter says (pp. 102, 103):—" *Pauperies* is the damage done by an animal contrary to its usual nature, and therefore bearing a kind of resemblance to wrongs. If a tiger destroys a human being it but acts according to its nature; but when an ox gores, the act may be regarded as a breach of the good behaviour that is its second nature . . . . No action lay if the animal were irritated or roused by another. Thus where a horse was struck by a *dolo* or a spur, and reared and kicked a person, it did not commit *pauperies*. The injury was not the result of an outbreak of unusual badness, but was due to the mismanagement of the horseman, and therefore the owner of the horse is not responsible, but only the person that irritated the horse." Similarly, Mr. Roby says that the action "was allowed against the owner, at the time of action, of a four-footed beast (not being *fera*) or other animal, if the beast without cause, except from its own wildness of nature (e.g. a kicking horse, a fierce bull or dog) caused damage directly or indirectly" (Intro. to *Dig.* p. 136, note n.). Once more the late Dr. Walker, who has included the ninth book of the Digest among those he has selected for analysis and annotation—a valuable work of which we have to regret the interruption by a too early death—Dr. Walker defines *pauperies* as "mischief occasioned by the *vice* of any animal capable of vice;" and in a note on the words *commota feritate* he says this means "when its temper is causelessly stirred within it, not when it is excited by serious provocation, *commota, non incitata*, says Pothier; and Gothofred explains that its malice must be innate, to give ground for the action *de pauperie*; not stirred up from without, as by the roughness of the road or the cruelty of the driver." The only other commentator on the civil law to whom I need refer is Domat. In the passage which was cited at the bar from part 1, bk. 2, sect. ii, art. v. (*Cushing's* ed. vol. i., p. 668, par. 1561, "of him who cannot keep in his horse or



other beast ") we have little more than a repetition of what is laid down in the passage from the Institutes, iv. iii. 8, which was also cited. "As to all other damage which may be done by beasts," says Domat, after referring to the case of cattle trespassing, "he who is the owner or who has charge of them will be answerable for it, if he could or ought to have prevented the evil." Then he takes the same illustrations as Justinian of a wagoner or mule-driver not strong or skilful enough to hold in a mettlesome horse or an unruly mule, and who is held liable for the damage they cause: "for he ought not to have undertaken what he had not skill or strength enough to perform;" or as Gaius puts it (in a passage from his commentary *ad edictum provinciale*, bk. vii. quoted in the *Dig.* ix. ii. 8, 1), *nec videtur iniquum, si infirmitas culpæ adnumeretur, cum affectare quisque non debeat, in quo vel intellegit, vel intellegere debet, infirmitatem suam alii periculosam futuram. Idem iuris est in persona eius, qui impetum equi, quo vehebatur, propter imperitiam vel infirmitatem retinere non potuerit.* Thus in the present case if Mr. Cowie chose to allow his son, the small boy whom we saw holding the reins, to drive his horse, as he is said to have been in the habit of doing, and the horse broke away, *propter imperitiam vel infirmitatem* on the part of the driver, and did damage, this would clearly on the above principle be a case of *culpa*, for which an action would lie, but *culpa* of a kind which, for reasons given at the outset, we do not find to have been proved in the present case. The other cases mentioned by Domat in the same paragraph, of overloading, &c., are also cases of *culpa* or negligence, and consequent liability, and therefore immaterial for our present purpose. In par. 1566 he speaks "of horses who bite or kick" and says: "Those who have horses or mules which kick or bite ought either to warn people of their being vicious, or to take care to have them well watched, to prevent all occasion of danger, otherwise they will be made liable for the damage which they shall happen to do." In a note he speaks of accidents "occasioned by the imprudence of those to whom they happen," and gives an illustration which seems rather to imply dissent from the doctrine of the Digest that the owner of a

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horse which kicks a stranger, who goes up to it without necessity and strokes it, would be held liable for *pauperies*. To sum up, the result of the examination of the Roman law authorities appears to be this. Just as no man is liable for *damnum sine iniuria*—as Gaius puts it (III. 211), neither by the Aquilian, nor by any other law, *damnum quod sine iniuria datur reprehenditur, itaque impunitus est qui, sine culpa et dolo malo, casu quodam damnum committit*—so in the case of animals, no one is liable for damage caused by his beast unless in the conduct or behaviour of the beast there has been something analogous in the case of an irrational being to what in a rational being would be called *iniuria*, which something in the case of an animal is called *pauperies*, and which on this definition has not been proved to exist in the case now before the Court.

It is, however, still necessary to consider whether the law of *pauperies* has been modified and the liabilities of owners enlarged, and if so to what extent and in what respect, by the Roman-Dutch jurisprudence. And here it will be convenient first to deal with the great authority of *Voet* who, as usual, to a great extent follows the treatment of the Digest, and on whose observations, so far as they merely follow the Digest, I need say nothing further. *Voet*, after beginning by defining *pauperies* as damage committed by animals, and thus distinguished from *iniuria*, continues, *nocet vero animal vel secundum vel contra naturam sui generis*, and proceeds (IX. 1. 1-3) to discuss the former class of cases, that of animals doing harm in accordance with their nature, such as cattle grazing where they have no right to be. In these cases the damage was not strictly *pauperies*, which accounts for there being nothing corresponding in the parallel passage of the Digest, but it was damage for which the owner could be made responsible in various forms of action, according to the circumstances, and he could in some cases discharge his liability by surrendering the animal. Thus in these cases too the action was noxal, which accounts for its discussion here. *Voet* then proceeds (4-8) to cases of *pauperies* proper, when the animal does mischief *contra naturam*, and this he says occurs *quoties mansueti feritatem assumunt*, when tame animals become fierce, as when a horse or an ox, *feritate*

*commotus*, proceeds to kick or gore. Then he deals with the case in which the animal is provoked by the person he attacks, in which event no one is liable, as he has only himself to blame for the consequences of his own folly, and that in which he is provoked by a third party, or the damage is caused by the negligence of a third party, in which case the third party and not the owner is alone liable to make compensation. The action against the owner for *pauperies* only arises when the animal is *sponte commota*. By *sponte* I take it we must understand spontaneously, its ferocity being aroused without any extrinsic cause. He proceeds to illustrate this position in the following section by the case given by Aſſenus of the stable boy and the mule, and that given by Ulpian, of the horse which responds to a caress with a kick, and that given by Scævola of the rams or bulls fighting. Then he gives another case, illustrating the same principle. An ox gores a horse, the horse lashes out and kills a pig. The owner of the pig must sue the owner of the ox, not the owner of the horse. Then he takes the case, which is very much in point in the present action: *Si iumenta sine causa turbata cessim eant, aut semet ipsa eripiant, et feratur equis auriga, nec currus audiat habenas, hæc actio locum habet.* "If beasts of burden are frightened without cause and back, or start off on their own account, and the driver is carried on by the horses, and cannot control the vehicle, the action of *pauperies* lies for any consequent damage." Now is that the present case? The point seems to be an arguable one. From one point of view it may be said that the defendants' horse did break loose *sine causa*, without, that is to say, any real objective cause, since if he had remained still he would have suffered no hurt; but on the whole I think we must understand *causa* in a subjective sense, a cause presenting itself to the intelligence of the animal, and no doubt such a cause did present itself here, and thus the present case seems rather to fall within the principle of the illustration which follows, where our author says: "*Sane si quadrupedes nulla feritate commotæ, sed casu damnum dederint, dum forte equis ac mulis plaustrum in elivo ducentibus ac collapsis, plaustrum cessim ire cœpit, ac retro rediens adstantem contrivit, nec in dominum nec in alium actio danda est, quoties nulla cuius-*

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quam culpa concurrat." "Certainly if the animal was not excited by any ferocity, but has caused damage by mischance, as for instance if horses or mules were drawing a wagon up a hill and it began to go back, and in going back crushed a bystander, no action will lie either against the owner or against anybody else, as long as there has been no negligence on the part of anybody contributing to the mishap." That is no doubt a somewhat stronger case in favour of the owner than the present, for there the damage would be so to speak automatic, without any exercise of volition on the part of the animal. But on the whole the present case also appears to be one of accident in the strict sense of the word, the result of *casus, nulla cuiusquam culpa concurrente*, and therefore according to *Voet*, nobody being to blame, not even the horse, there is no action against anybody, not even the owner. That being so, it is unnecessary to follow *Voet* further in what he says specially as to dogs, or in his discussion as to the form of the action, the parties who in certain cases must be sued, or as to the measure of damages—on which latter point some conflicting decisions will be found mentioned in *Sande*, Decis. Fris. V. 7, 5—or yet as to how far the option given by the Roman law of surrendering the *noxæ* and consequent discharge from liability was affected or modified in modern practice, a point which has been much discussed by other writers. Neither need I dwell on the discussion of the subject which will be found in Huber's *Prælectiones*. Referring to the case of the two rams he says: *ubi distinguitur inter culpam animalis provocantis et innocentiam provocati, quæ in re videtur aliquam rationem habuisse iuris eius quod Plutarchus probat in lib. τὰ ἄλογα λόγῳ χρησθαι*, Irrationalia ratione uti; and he adds the *scholium* that the *ratio decidendi* rather is that the beast which provokes the fight acts contrary to, while that which is provoked retaliates in accordance with, the nature of such animals. I may add that Huber informs us that by the law of the Saxons if the owner offers to surrender the animal, and the person damaged declines to accept it, in such case it can be kept by the judge—a contingent right which I am not aware that, after inspecting the animal, any member of the Court is anxious to exercise in the present case.

It appears, therefore, that on the whole there is nothing in *Voet* to extend the civil law definition of *pauperies* so as to cover the facts with which we have here to deal. Some of the writers on the Roman-Dutch law, however, seem to go somewhat further. Thus *Grotius* says, treating of obligations *quasi ex delicto*, "For wrongs done by animals, a person is liable when his animal, while unusually excited and fierce, has injured any one" (III. 38. 10); but as he refers as authorities for this proposition only to the passages in the Digest and Institutes which have already been examined, it is sufficient to say that the words in the English translation, "while unusually excited and fierce," must be regarded as equivalent to *commotu feritate*, and be explained and construed in a similar manner. Again, he says (*ibid.*, sect. 12) that "a wagoner or countryman whose horses bolt, even though without any fault on his part, is bound to make compensation;" but this statement is based merely on the passages from Gaius in the Digest, IX. 2. 8. 1, and in the Institutes, IV. III. 8, quoted above, which, as already shewn, are to the effect that in certain circumstances *imperitia*, or even *infirmitas*, must be regarded as legally equivalent to *culpa*. Then again *Van Leeuwen* says, IV. 39. 6, Kotze's Transl. II. 323, 324: "He whose animal causes damage to another must make compensation or deliver up the animal for the same. But, if the animal be wild by nature, or otherwise of a mischievous propensity, as for instance a dog accustomed to bite, or a horse accustomed to kick or the like, the owner will be liable to make full compensation for the damage done, without being able to get off by giving up the animal." This passage, which was cited by the plaintiff's counsel, is very broad and comprehensive, and certainly appears to be strongly in the plaintiff's favour, and to tend to shew that, even if the animal has no mischievous propensity, if it does damage, and the owner does not exercise the option which in that case he enjoys of giving it up, he is bound to make compensation. I must however here also, as in the case of *Grotius*, observe that *Van Leeuwen* merely cites the authorities on the civil law which have been already examined, and, great as his authority is, so far as his statement appears to extend the liability by them defined, I do not feel either

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bound to follow it or indeed justified in doing so. Undoubtedly the learned translator is perfectly correct in observing in his note, in which he refers to some of the colonial cases, that it is unnecessary to prove knowledge on the part of the owner of the mischievous propensities of the animal; but, notwithstanding the *dictum* of *Van Leeuwen*, I adhere to the opinion that such propensities must exist, or at all events that the animal on the occasion in question must have acted as if they existed, before his owner can be held responsible for his conduct. Then we have also a note by *Dekker*, citing *Puffendorf, De Iure Nat. et Gent.* III. 1. 6, as follows:—"Il n'y a point de doute qu'un maître ne soit responsable du dommage que ses bêtes causent non seulement par sa négligence, comme quand il les laisse échapper, ou par sa malice, comme quand il les irrite lui-même; mais encore lorsqu'elles sont uniquement poussées par leur férocité naturelle ou par un mouvement ordinaire. Car il falloit ou ne pas nourrir de tels animaux, ou les garder si bien qu'ils ne pussent faire du mal à personne." Now this passage, which was cited by *Mr. Guérin*, is certainly a very strong one; for if the owner is liable not only in cases of negligence or *culpa*, when he lets his beast escape, and in those of *malice*, or *dolus malus*, when he irritates it, but also when the animal is impelled to do the mischief not merely *par férocité naturelle* but also *par un mouvement ordinaire*, it is difficult to see how the present case can be held not to be included in so comprehensive a definition. On turning to the original, however, I find that it is perhaps scarcely accurately represented by this translation, and in any case it is materially qualified by the context. What *Puffendorf* says is: "Id porro dubium non habet, quin dominus reparare debeat damna quæ ab suis animalibus per suam culpam aut se instigante data sunt; aut si ex naturali et usitata ferocia animal ipsius alterum læserit, aut per ordinarium instinctum alteri damnum dederit." *Ordinarius instinctus* seems to me rather different from *un mouvement ordinaire*. It is not so much a motion, or movement or impulse, natural and ordinary in the circumstances, but the natural instinct or disposition of the particular animal, as for instance in the case of a savage watch-dog, whose instinct it is to attack strangers.

*Debat enim*, he continues, evidently referring to animals of that kind, and not to such animals as a quiet and peaceable horse, *dominus vel talia animalia non alere, vel ita eadem custodire, ne alteri damnum dare possent*. And then he goes on:—*Nam ubi a me nihil admissum est, quod imputari mihi queat, nulla ratio est quare ego magis, qui invitum damnum feci, fatale malum luere debeam, quam alter qui accepit.* “For when I have done nothing blameable (such as neglecting to look after my beast, or irritating it, or keeping a beast with vicious propensities or instincts and not under proper control) there is no reason why I, who have caused damage against my will, should be any the more bound to pay for the disaster than another who has been the victim of it.” On the whole it seems to me that this principle, enunciated by Puffendorf as in accordance with the law of nature and of nations, and which is certainly in accordance with the English law and the old civil law, as already shewn, is also in accordance with the modern Roman-Dutch law, and that on this principle the defendants cannot be held liable in the present case. The only other publicist to whom I need refer is *Merlin*, whose observations on animals were cited at the bar, and whose *Répertoire* is useful as shewing how the modern civil law was understood in France previous to the Code Napoléon. Now *Merlin*, in the passage which was quoted, *s.v.* “Animaux,” vol. i., at p. 225, in the paragraph which begins, “Un muletier ou un charretier qui n’ont pas la force ni l’adresse de retenir un cheval fougeux, ou une mule qui s’effarouche, sont tenus du dommage que ces animaux peuvent causer,” and in the two following passages, is merely dealing with the special kind of so to speak constructive negligence which, as shewn above, is set forth and explained in *Gaius* and *Justinian* and in the commentary of *Domat*. He goes on to say:—“Les maitres des chiens qui mordent, des chevaux qui ruent et mordent, du bœuf qui a coutume de frapper de la corne.” &c., “sont tenus du dommage que ces animaux causent.” This, again, is clearly the case of the *equus calditrosus*, the *bos cornu petere solitus*, or of other animals with equally vicious propensities. Another passage which might be referred to will be found *s.v.* “Blessé,” vol. i., p. 751, sect. 3. “Blessures faites par accident.”

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There he says: "L'imprudence grossière produit l'obligation de réparer le mal que l'on a fait. Ainsi, la maladresse des cochers et des charretiers, dans la conduite de leurs voitures, ne les rend pas excusables; le maître même, soit qu'il se trouve ou [non] dans sa voiture, est responsable de ses chevaux et de son conducteur. *C'est par cette raison que nous sommes garans des blessures que peuvent faire nos animaux.*" He then goes on to speak of a case in 1648, in which the sum of 1000 livres was recovered from the owner of a horse which had so injured the plaintiff's leg that it had had to be amputated. And again, in 1688, the master of a dog, which had bitten in the arm a young lady, who was passing in broad daylight through the common courtyard of a house to her own lodging, had to pay 500 francs damages and 200 francs for medical expenses. "Cette blessure," we read, "avoit été si considérable que la demoiselle en avoit gardé le lit trois mois." The expression that "we are guarantors of the wounds caused by animals which belong to us" is certainly a strong one, but the reasons which he assigns for it are *imprudence grossière* or *maladresse* on the part of the owner or his servants, and it may fairly be presumed that something of the kind was proved in the case in 1648 in which the plaintiff, still more unfortunate than Mr. Cowell, lost his leg owing to the conduct of the defendant's horse. The case of the dog and the demoiselle, which happened just two hundred years ago, requires no further comment. From Merlin I may pass to the passage in the Code Napoléon, sect. 1385, quoted by SMITH, J., in *Le Roux vs. Fick*:—"Le propriétaire d'un animal, ou celui qui s'en sert, pendant qu'il est à son usage, est responsable du dommage que l'animal a causé, soit que l'animal fût sous sa garde, soit qu'il fût égaré ou échappé." This rule, as Mr. Justice SMITH says, is certainly "short and comprehensive," and would appear to somewhat enlarge the liability of owners in France beyond that under the previously existing law, as explained by Merlin. The provisions of the Code Napoléon form the basis of the modern civil law in most European countries where that system prevails; but of course in themselves they have no more authority in this Colony, where we have a system of jurisprudence based on the civil law as established in the Netherlands at a much

earlier date, than they have in England, where the civil law has never been in force at all save as one of the sources from which the common law is derived.

With regard to the decided cases in our own Courts, I have already pointed out that all the cases in which an owner has been held responsible for damage caused by his beast have been cases in which that beast has caused the damage owing to its vicious or mischievous propensity. The most recent cases appear to be those of *Spïres vs. Scheepers* in the Eastern Districts Court and *Grier vs. Miller* in the Supreme Court. In the former case Mr. *Solomon* is reported to have argued that "the Roman-Dutch authorities went further than the English. By our law if a man was where he had a lawful right to be, and he was injured by another man's animal, the owner of such animal was liable." But this broad proposition was not adopted by the Court and Mr. Justice BUCHANAN, in giving the judgment of the Court, referred to and adopted an observation made during the argument by the JUDGE PRESIDENT that "the liability of owners of animals for injuries done is founded on the doctrine of *culpa*, or negligence." And later on he speaks of cases in which the owner would be relieved of liability, "as where a domesticated animal acts in a way in which he would not naturally have been expected to act" (3 E. D. C. 176, 177). In the recent case of *Grier vs. Miller*, according to the report in the *Cape Times*, the CHIEF JUSTICE appears to have held the defendant liable for the damage caused by his dog, owing to the "vicious propensity" of that animal, while Mr. Justice BUCHANAN preferred to rest his judgment simply on the ground of negligence, in not keeping the dog under control. I cannot say that I am disposed to go so far as that learned Judge appears to go in holding that there must always be negligence on the part of an owner of an animal before he can be held liable; I should rather say that either negligence must be proved on the part of the owner, or else there must be some vicious, perverse, or unwarrantable behaviour on the part of the beast, constituting *inimicitia*, and for which the owner is therefore liable. In the present case, neither *culpa* on the part of the owner nor *inimicitia*, if I have succeeded in correctly defining the meaning of that

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word, on the part of the horse, have been proved by the plaintiff, and the result is that his action fails.

I am bound to say that I have arrived at this conclusion with considerable regret and should have been glad if we could have seen our way, on a review of the facts and of the law as applicable to them, to award the plaintiff some compensation for the serious damage he has undoubtedly, through no fault of his own, sustained. The case is one in which I think there was not a legal but a moral obligation on the defendants to tender such compensation, and I understood during the trial that this obligation had in fact been to some extent recognised, but unfortunately it had been impossible to arrive at an understanding as to the amount. I think moreover, though there is some conflict of evidence on the point, that immediately after the accident Mr. Cowie in all probability gave the plaintiff what the latter might fairly construe as an assurance that some sort of compensation would be made to him. Such a promise in such circumstances might fairly be said to have been made on a *iusta causa*, and thus, according to some authorities on our law, would constitute a good cause of action. But even if that were so, the action would lie not against the defendant firm but against Mr. Cowie individually; and after the decision of the Supreme Court in the case of *Alexander vs. Perry*, Buch. 1874, p. 59, and the elaborate judgment of the CHIEF JUSTICE on the same point in the more recent case of *Malan and another vs. Secretan* (Foord's Repp. 94), it would be useless to contend that in the Courts of this Colony an action on a contract could be maintained unless supported by something tantamount to the "valuable consideration" of the English law. The result is that judgment must be entered for the defendants; but the case is one in which we strongly hope that we shall not be pressed to make any order as to costs.

SOLOMON, J., concurred.

COLE, J.:—While concurring in the judgment of the Court just delivered I confess I had some difficulty in arriving at that conclusion. My difficulty principally arose from the



very strong and distinct terms in which *Grotius* (3. 38. 12) lays it down that "A wagoner or a countryman, whose horses bolt, without any fault on his part, is liable for the damage they may occasion." Now it is true that to this section there is a note referring to a passage in the Digest which, when examined, will scarcely be found to go to the full extent of *Grotius's* own words. But it must be remembered that the latter was not commenting on the Roman Law, or stating what that law was, but was declaring what he conceived to be the law of his country—the law of Holland at the time he wrote. Among the commentators on *Grotius* is *Schorer*, whose notes are justly regarded as very valuable. He points out any error which he conceives *Grotius* to have made or any change or modification of the law which may have subsequently taken place. Now on the passage I have cited he has no note or comment at all, thus leading one to believe that he considered the law contained in it to be correctly laid down. Again *Voet* (9. 1. 4) refers to *Grotius*, 3. 38. 14, in support of what he is saying, but says nothing whatever about 3. 38. 12; and as *Voet* never hesitated to correct *Grotius* where he thought he was wrong, it would seem that in the passage cited he considered him to be right. Then we come to *Van der Keessel*, who wrote his Theses about 180 years after *Grotius* wrote the "Introduction" upon which they are entirely based. *Van der Keessel* also is careful to point out any error of his author, and especially to shew where the law has been altered or modified in the intervening period. But he has no thesis—no word of comment—upon this same passage. Thus I cannot help believing that if an action, similar to the present one, had been brought in one of the Courts of Holland either in the time of *Grotius*—two and a half centuries ago—or in that of *Van der Keessel*, the commencement of the present century, the judgment would have been against the defendant in spite of his having been guilty of no fault. But then, it is true, laws become altered or modified almost insensibly in the course of time; and it is impossible to resist the vast array of the authorities which the learning and industry of my brother, the JUDGE PRESIDENT, has brought to bear on this case proving the change to have taken place. Whether this is on the side of equity

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or not I hesitate to say; for while it is hard that the innocent owner of an animal hitherto quiet and innoxious should have to pay for the damage it may cause under some sudden irritation, it may seem harder still that the sufferer from the injury should have no right to compensation either directly from the animal's owner or from the right to retain the animal itself. It hardly meets *Voet's* summary of the matter (9. 1. 8.) "Tendunt hæ actiones ad id ut damnum reparetur aut animal noxæ detur." Here the sufferer gets neither money compensation nor the offending animal. However, we are here to administer the law as we find it, and not as we might wish it to be. And, as I have already said, I am reluctantly driven to the conclusion that the law is such as has been laid down in the judgment just delivered by the JUDGE PRESIDENT.

*Hopley, C.P.*, said that, in accordance with the suggestion which had fallen from the Court, his clients would not ask for costs.

[Plaintiff's Attorney, DEWHURST.  
Defendants' Attorneys, COGHLAN & COGHLAN.]

#### PALMER *vs.* RHODES.

*Contract of Sale.—Custom of share-market.—Time bargain.—Tender.*

*On November 26, P. sold R. certain shares, to be delivered and paid for on or before December 14, at the option of R. Two or three days before this contract it had been agreed at meetings of the local share-dealers and brokers that "time bargains" such as the above should be paid on the due date within banking hours, but R. was not a party to this agreement, nor did it appear that he was aware of it. Evidence was led that a custom to the same effect had existed previous to the meetings, but it did not appear to have been uniformly observed and several brokers denied that it was either general or notorious. December 14 was*

*a Wednesday, on which day the banks closed at twelve o'clock, but the share market was open throughout the day. At 11.45 A.M. on that day the broker, through whom R. had bought the shares, tendered them to him and demanded payment. R. said he could not then pay and requested the broker to ascertain the market price. The broker left and, without again communicating with R., sold the shares on instructions from P. At 3 P.M. R. tendered P. a cheque for the shares, which was refused, and P. now sued him for the difference between the contract price and that at which they were sold. Held, that R. was not bound by the alleged custom and had not broken his contract to pay for the shares on December 14. Held also, that as P. had not objected to R.'s tender on the ground that it was by cheque, and admitted that he would have equally refused cash, he was not entitled at the trial to object to the tender on that ground.*

This was an action for damages for breach of contract to purchase certain shares. On November 26, 1887, the plaintiff sold the defendant 200 shares in the Klipfontein Diamond Mining Company, Limited, at the price of 65s. per share, upon the terms set forth in a broker's note, annexed to the declaration, and which was as follows:—

"Bought on account of C. H. Rhodes, Esq., from John Palmer, Esq., 200 Klipfontein shares at 65s. to be delivered on or before the 14th December at option of purchaser. Accepted (Sd.) C. H. RHODES.—Payment, cash against scrip. Seller to pay brokerage and stamps. (Sd.) W. E. RICKMAN, broker."

The declaration alleged that the defendant had refused to accept the shares, or pay for the same, and the plaintiff had been therefore compelled to resell them at the market price of 61s. and had thus incurred a loss of £40, and had had to pay £6 2s. for brokerage on such re-sale. The plaintiff claimed £46 2s.

The defendant admitted the contract but denied the breach, and pleaded that on December 14 he duly offered and tendered to accept and pay for the said shares but the plaintiff refused to accept the price or deliver the shares. He further pleaded that if the shares were resold as alleged, they were

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sold below the market price, and that if the plaintiff had sustained any loss or damage it was not incurred by the act or default of the defendant. In his replication, the plaintiff denied the tender alleged and further said that, if such tender was made, it was after the defendant had previously, on the same day, on the shares being tendered to him, unconditionally and absolutely refused to accept or pay for them, and also "that such tender and offer were made after the expiration of the hours within which according to the custom of the share market in Kimberley such tender and offer would be valid and binding, the said broker's note having been entered into in Kimberley and subject to the custom prevailing in the said market."

For the plaintiff, the broker, Mr. Rickman, was called and stated that at about 11.45 A.M. on December 14 he went to the defendant, who was a clerk employed at Mr. Goch's store, and tendered him the scrip, which he had only received from the plaintiff a quarter of an hour earlier. Defendant said he could not then pay for the shares and would have to sell them and pay the difference. Witness told the defendant that he wanted his cheque to pay into the bank; it being a Wednesday, which was a half-holiday, the bank closed at 12 but cheques could be paid till about 12.15. Defendant asked what price witness could obtain on the market and he replied perhaps 62s. 6d. Defendant then requested him to go down to the market and ascertain the best price obtainable, and return and inform him as soon as possible. He then obtained an offer on the market of 61s. and returned twice to the store, but failed to find the defendant, either there or on the market. He then took the plaintiff's instructions and closed at 61s. receiving payment in cash. This was shortly after 12. In the afternoon he could have obtained 62s. 6d. and perhaps more. (There was other evidence that in the afternoon the shares went up to 64s. 6d. or 65s.) He sold at once on plaintiff's instructions for fear of a further fall. About lunch time witness met defendant, who told him he had arranged to take up the shares, and after lunch defendant in his presence tendered plaintiff a cheque for the purchase price, which he refused to accept. The regular custom of the market, so far as witness knew, was that time bargains

should be paid within banking hours on the day they fell due. It appeared that a resolution to this effect had been passed at a meeting of share-dealers on November 22, and accepted at a brokers' meeting on November 24, or two days before the present contract was made. This resolution, in Mr. Rickman's opinion, only affirmed a previously existing custom. He did not know whether defendant was aware of the custom. The plaintiff himself had not got the shares till 11.30. The plaintiff, a speculator on the local share market, was also called and corroborated Rickman. He refused the defendant's cheque because it was after banking hours and would have equally refused cash if tendered, as he understood the custom to be to take up time bargains before the banks closed and had always done so himself. Another broker was called to depose to the same custom but he admitted that, before the above mentioned resolutions had been passed, there had been some laxity in its observance. The practice was for the broker to go to the purchaser with the scrip and it would be scarcely reasonable to do so only ten minutes before the banks closed. He would not consider that a purchaser who tendered cash on the Wednesday afternoon had broken his bargain, though he would have failed to comply with the custom. For the defence, three brokers of considerable experience were called, who stated that, previous to the brokers' meeting of November 24, there had been no regular custom of the kind set up, and in the absence of any special arrangement time bargains could be taken up at any time within business hours, say from nine to six, and not solely within banking hours. The defendant's evidence was to the effect that he had made arrangements to take up the shares on the due date. Rickman came to the shop a few minutes before noon and said he wanted the money before the bank closed. He asked Rickman to ascertain the market price, not having made up his mind whether he would sell the scrip or borrow money to take it up. After waiting some time he went down to the market, about 12.30, with a cheque in his pocket to take up the scrip, but could not find Rickman. After lunch he saw him and offered his cheque, when Rickman told him he had sold the shares on his account by Palmer's orders.

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and referred him to Palmer, who refused to accept the cheque and demanded the difference, which defendant refused to pay. He had not been aware of the custom as to paying within banking hours, and thought he would have time in the afternoon to settle the matter. If Rickman had come to him earlier, he could have paid before 12. In the afternoon he bought another parcel at 65s.

*Frames*, for the plaintiff, argued that, so far as there was a conflict of evidence, that of Rickman was more to be relied on than the version given by the defendant. The shares were tendered before the time for doing so had expired and that was sufficient, however late the hour: *Startup vs. MacDonald*, 6 M. & G. 593. The defendant having failed to carry out his bargain, the plaintiff was entitled to re-sell at his expense: *Dorriens vs. Hutchinson*, 1 Sm. 420, cited in *Fisher's Dig.*, vol. iv. 8249, 8250. In that case, the plaintiff having tendered the stock on the day agreed on for the transfer, and the defendant having refused to accept it, it was held that the plaintiff need not wait till the end of the day, but might sell the stock to a third person immediately after the tender and refusal. In any case, the defendant's tender was too late, according to the custom of the market, which he contended had been shewn to be reasonable, general and notorious, and therefore binding upon the defendant. The defendant, even if not himself aware of its existence, must be taken to have given his broker an implied authority to do business for him according to the known usages and customs of the market: *Grissell vs. Bristowe*, L. R. 3 C. P. 112. Another point was that the defendant's tender was bad, being by a cheque and not in cash, and although this objection was not taken at the time, that did not prevent the plaintiff from taking it now: *Stewart vs. Ryall*, 5 Jut., at p. 156.

*Feltham*, for the defendant, was not called upon.

LAURENCE, J.:—This is an action for breach of a contract to purchase certain shares, and the contract is admitted to be correctly set forth in the broker's bought note attached to the declaration. The case for the plaintiff has been very

fully and carefully argued but we do not think it necessary to hear the learned counsel for the defendant. The plain meaning of the contract before us is that the defendant was entitled to receive these shares at any time on or before December 14. He had the option of demanding them and paying for them before that date, and he was bound to pay for them not later than the 14th. What then was the extreme limit of time which the defendant had for the discharge of this obligation? Apart from any special custom, I should be disposed to hold that a contract to accept and pay for shares on a particular day is a contract to do so within the ordinary business hours of that day, within the hours during which a broker might reasonably expect to find purchasers and sellers at their offices or places of business, and that is, on the Kimberley share market, according to the evidence before the Court, up to about 6 P.M. According to the case of *Startup vs. Macdonald*, cited on behalf of the plaintiff, even if the shares had been tendered at a later hour on the evening of the 14th, the defendant, if then found at his office, might have been compelled to take them up; but that case is certainly not an authority for the proposition that the vendor could insist on payment at any hour he chose, however early, on the last day of the period over which the option of the purchaser extended. The defendant, in the present case, was no more bound to pay for these shares, say at 8 A.M. on the 14th, than he would have been say at 8 P.M. on the 13th. It is admitted that a tender of payment was made by the defendant at about three o'clock in the afternoon of the 14th, which was clearly within business hours, but to this tender the objection has for the first time been taken in Court that it was the tender of a cheque, and not of cash, and therefore bad. Now it is notorious that when payments of considerable sums, amounting to several hundred pounds, are made, it is not usual for men of business to carry about such sums in sovereigns or bank notes, but such payments are almost always made by cheque. No doubt the creditor is entitled to insist on payment in cash, if he thinks fit, but in the present case no objection was made to the cheque as such, it is not suggested that there were not sufficient funds to meet it, and Mr. Palmer

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indeed expressly admitted that if cash had been offered it would have been equally refused, and the reason is obvious, for he had already parted with the shares. The objection to the tender on this ground therefore cannot be sustained. Another and more important objection is that the tender was too late, inasmuch as, according to the custom of the local share market, time bargains have to be taken up within banking hours, and on December 14, which was a Wednesday, the banks had closed at twelve o'clock. Now as to the usage of the market, clearly in a case of this kind it is not the business of the purchaser to run about and find his vendor; he is entitled to wait until the vendor or his representative brings him the scrip, and then, "cash against scrip" in the words of the contract, the transaction has to be completed. In the present case, the broker came to the defendant a few minutes before twelve, and required immediate payment before the banks closed. Now was this custom as to payment not merely within business but within banking hours a custom with which, as contended by the plaintiff, the defendant was legally bound to comply? Before the defendant can be held to have been bound by a custom of which he had no actual knowledge and no express notice, it must be shewn, as laid down in the case of *Grissell vs. Bristowe*, that such custom is not only reasonable in itself, but is also general in its operation, in the particular community or in the particular class of business in which the transaction took place, and that it is notorious within the same limits. Now the custom set up in this case appears to have been embodied in a resolution passed at a meeting of certain dealers in shares held on November 22 and approved at a meeting of brokers held two days afterwards. It can scarcely be contended that this resolution, of which the defendant appears to have had no notice, express or implied, is to be regarded as in itself constituting a binding custom. It was argued that between November 24 and December 14 the defendant had plenty of time to ascertain about the custom; but we must look not to the date of payment but to the date of the contract, which was November 26, two days after the brokers' meeting, and consider whether the effect of this resolution was at that time so notorious as to

constitute an implied term, a sort of *pactum adiectum*, of the contract then made. I cannot hold that this was the case, and it therefore remains to be considered whether independent of, and previous to the passing of, these resolutions, a general and notorious custom of the nature alleged existed in the local share market. On this point there is a certain conflict of evidence, but the balance of evidence is decidedly against the existence of such a custom and goes to shew that, previously to the resolutions, no one was held bound, in the absence of a special arrangement to that effect, to take up his time bargains before the banks closed. On the whole, therefore, and taking all these facts into consideration, I do not think that when the defendant made this bargain he can be held to have been bound by a custom of which he received no intimation until within a very few minutes of the hour by which it is contended it was his duty to comply with it. If however the defendant, when the shares were tendered to him, or at any time, either on or before December 14, absolutely repudiated his contract, the question of custom would be immaterial, and the plaintiff would have been fully entitled to re-sell the shares and claim the difference, as laid down in *Dorriens vs. Hutchinson*, and the difference between the agreed price and the market price would be the measure of the damage sustained. I cannot, however, find that such repudiation has been proved. I agree with the learned counsel for the plaintiff in thinking that, so far as there is any conflict between Rickman and the defendant, the version as to what took place given by the former, who appears to be an impartial witness and who gave his evidence in a more satisfactory manner, is to be preferred to the account given by the defendant. But Rickman's account of what took place does not shew any distinct repudiation by the defendant. It merely amounts to this, that the defendant said he could not then make payment, and requested him to ascertain the market price, but did not authorise him to sell the shares without consulting him again. Rickman then found out the price and, having missed the defendant, sold the shares without consulting him and on instructions received from the plaintiff. It did not at all follow from what the defendant said that he would

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not be in a position to take up the shares in the course of the afternoon, which in fact he offered to do, and which, for the reasons already given, he was entitled to do. It is said that the shares were sold at once for fear of a further fall; as a matter of fact, instead of falling, they rose; but if there had been such a fall, and the defendant had failed to keep his bargain, the loss would have been his, and he would have been responsible for the damage, and the plaintiff and the broker were not entitled to exercise their judgment on this point on behalf of the defendant without first consulting him. On the whole, we are of opinion that the plaintiff has failed to prove the alleged breach of contract. The action must therefore fail, and costs must follow the result.

SOLOMON and COLE, JJ., concurred.

[Plaintiff's Attorneys, COGHILAN & COGHILAN.  
Defendant's Attorneys, H. C. & J. C. HAARHOFF.]

### GOLDBERG vs. THE QUEEN.

Act 28, 1883, § 75.—*Evidence.*—*Trap.*—*Corroboration.*

*Where a person had been convicted of an illicit sale of liquor on the evidence of a trap, which was entirely uncorroborated, and it appeared that the trap was accompanied by two other persons, who were alleged to have been present at the sale, but who were not called as witnesses and whose absence was unaccounted for, the conviction was quashed.*

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Goldberg vs.  
The Queen.

This was an appeal from the Police Magistrate of Kimberley, by whom Goldberg had been convicted of contravening sect. 75 of Act 28 of 1883 by an illicit sale of liquor. The evidence was to the effect that on the afternoon of February 6 a policeman, accompanied by two other men, went to a coffee-house, of which the accused appeared to have been joint proprietor with one Nathan, and there called for and was served with two bottles of beer, for which the accused received payment. The policeman, who deposed to these facts, could not say whether the beer was English or German; the other two men were not called. In the evening, some hours after-



wards, the same policeman returned to the place, and was served with liquor by Nathan. A detective then came, arrested Nathan, and found in Goldberg's bedroom thirty-three bottles of stout, twenty-one bottles of German beer, and four bottles of whiskey. Nathan had been prosecuted and convicted for contravening the Liquor Act before Goldberg was tried. Goldberg swore that he sold no liquor to the constable, and that the liquor found in his bedroom belonged to his partner Nathan, and was part of a Christmas present he had received. Nathan corroborated this statement and said that any liquor sold on the premises was sold by himself. On this evidence Goldberg was convicted and appealed.

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*McLachlan* argued for the appellant.

*Hopley, C.P.*, for the Crown, supported the conviction.

LAURENCE, J.:—I do not think it would be safe for the Court to sustain this conviction. The case for the Crown rests entirely on the evidence of a single witness, a constable employed as a trap, whose evidence the Magistrate believed rather than that of the accused. Now I cannot remember any case, either under the Liquor Act or under the Diamond Trade Act in the Special Court, in which the Court has thought it safe to convict upon evidence consisting entirely of the uncorroborated testimony of a single trap. These cases under the Liquor Act frequently come before the Judges in review, and sometimes on appeal, and in every case, where the prisoner has pleaded not guilty and the conviction has been confirmed, so far as I can remember, there has been corroboration on some material point. Usually the trap has been searched beforehand, and marked money given him, and a descent made on the premises immediately after the transaction, and the accused has been caught *flagrante delicto*, or the marked money has been found in his possession, or the trap has produced the liquor alleged to have been purchased, or there have been other circumstances of a similar kind, all of which are absent here. It does not appear that the trap was searched before he went to the premises, or that any attempt was made to arrest the accused

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after the alleged sale had taken place, and certainly the fact that in this case none of the usual steps appear to have been taken is a significant point which it is impossible to overlook. As to what took place in the evening, between 10 and 11 P.M., that affords no corroboration whatever of the alleged sale at 4 P.M. on the same day. It appears from Nathan's own evidence that he was properly convicted of having sold liquor that evening, but it does not follow from this that Goldberg, his partner, sold liquor in the afternoon. Neither does the finding of the liquor in Goldberg's bedroom, though possibly a suspicious circumstance and one of which the explanation given may be regarded as unsatisfactory, afford any corroboration of the occurrence of the particular sale of which he was convicted. It is of course clear law, and it was so expressly laid down by the Supreme Court in the often quoted case of *R. vs. Pound, 2 Juta, 2*, that a person employed as a trap is not an accomplice, and therefore in strict law his evidence does not require corroboration. But it is another question whether it is safe to convict on the unsupported evidence of a single witness of this kind, and, as I have already said, I cannot remember any case in which the Court has thought it safe to do so. Now it may be said that the Magistrate, who was the best judge of the credibility of the witnesses, having taken upon himself the responsibility of convicting on the evidence of the trap, this Court should not now interfere with that decision. I quite agree with the view that an appellate Court should be very slow to quash a conviction, merely because, on a question of fact or of the credibility of witnesses, it is disposed to differ from the view of the Court below, which is in a much better position to come to a right conclusion on such matters. And if the case had rested here, we might have felt unable to interfere with this decision, merely because we thought the Magistrate had placed too much reliance on the evidence of the constable. But the case does not rest there. Not only is the conviction unique in its dependence entirely on the unsupported evidence of a trap witness, but there is the further fact that this trap was accompanied by two other men, with whom a special arrangement for the purpose appears to have been made, and yet neither of these men was called on behalf of the Crown and

no explanation whatever is furnished of their absence. It has been suggested that if persons who gave information as to criminal transactions were compelled to appear as witnesses, it would be very difficult to obtain such information, and the operations of the detectives would be impeded. But there is a wide difference between giving information leading to the detection of a crime and being actually present when it is alleged to have been committed. In the latter case the persons alleged to have been present, and to have practically assisted in the trapping, should certainly be produced or their absence accounted for. In civil cases, parties are required to produce the best evidence, and there is certainly an analogous obligation upon the part of the Crown in criminal cases. That obligation in the present case has not been discharged, and, taking this into consideration together with the other features of the case, I can come to no other conclusion than that the appeal must be allowed and the conviction quashed.

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SOLOMON, J.:—I entirely concur. I think that in all trapping cases the Court should have before it some evidence that is beyond suspicion, and there can be no doubt that the evidence of persons engaged in trapping operations is not as a rule above suspicion. Where the evidence of such persons is entirely uncorroborated, I think there should be no conviction, as there certainly would not be in the Special Court. Moreover not only is the evidence of the trap uncorroborated, but the case is one where corroborative evidence might have been produced. There were two other persons who were with the trap, who might have been called, and whose absence is unexplained. I think it would be establishing a very dangerous precedent to lay down that, where other witnesses were present besides the trap, it is unnecessary for them to be called to corroborate him. For these reasons, and those which have already been given, I quite agree in thinking that this conviction must be quashed.

COLE, J., concurred.

\* Appellant's Attorney, DE WET

## TILLEY vs. TOWN, CREEWEL &amp; CO.

*Insolvency.—Discharge.—Ord. 6, 1843, §§ 106, 107, 117.*

*An insolvent who has obtained his discharge under sect. 106 of Ord. 6 of 1843 cannot be sued by a creditor who has not proved on the estate for a debt contracted before the sequestration.*

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Tilley vs.  
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& Co.

Messrs. Town, Creewel & Co. sued E. Tilley in the Magistrate's Court at Kimberley for £5 8s. 0d. for goods sold and delivered. It appeared that the debt was contracted in July 1885, and the defendant's estate was sequestered in the following September. The plaintiffs did not prove on the estate, and the defendant having offered a composition which was accepted by the only creditors who proved, in May 1886 the High Court granted his discharge, the order being in the following terms:—"That the said E. Tilley be discharged with his estate in terms of sect. 106 of Ord. 6 of 1843." The Magistrate gave judgment for the plaintiffs on the ground "that the High Court simply pronounced a decree declaring the sequestration of Tilley's estate at an end, and the insolvent re-invested with his estate in terms of sect. 106 of the Insolvent Ordinance, but the Court did not also pronounce a decree discharging the insolvent from all debts due by him at the time his estate was surrendered and from all claims and demands proved or provable against his estate." Against this decision the defendant appealed.

*Guerin*, for the appellant, submitted that a discharge under sect. 106 of the Ordinance amounted to a complete release of the insolvent from all his liabilities. (Stopped *arguendo*.)

*Frames*, for the respondents, referred to the affidavit filed by Tilley on which he obtained his discharge, and which had been put in before the Magistrate. In this affidavit he stated "that there are no other creditors that have not proved against my said estate by reason of absence from this Colony or other causes." The respondents were admitted to have been creditors at the time of the sequestration, and the

appellant had therefore obtained his discharge by a misrepresentation, and could not now take advantage of his own wrong and set up a discharge so obtained as a defence to the present claim.

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LAURENCE, J.:—It is quite clear that this appeal must be allowed. The Magistrate appears to have confounded the effect of a discharge under sect. 106 with that of a release under sect. 107 of the Insolvent Ordinance. It is expressly provided that the latter shall not operate as a discharge or affect the rights of creditors who have not proved on the estate. But an order of discharge whether granted under the 117th section, after the provisions of that section have been complied with, or under the 106th section, after a composition has been accepted, operates as a complete release from all liabilities existing at the time of sequestration. The law on this subject was discussed in this Court in the case of *Ferguson vs. Stanton* (3 H. C. 289), where it was held that a rehabilitation or discharge is an effectual bar to an action being brought on a contract made in the same country where the discharge has been obtained. In the present case, the decision of the Court below has been supported, not on the ground assigned by the magistrate, but on the ground that the appellant obtained his discharge by misrepresentation. Now with regard to the former order of this Court, we should of course presume *omnia rite esse acta*; and if it is desired to impeach that order on the ground that it was improperly obtained, the proper steps should be taken to set it aside. As long as it stands, it clearly operates as a bar to the present action. I should not however wish to be understood as suggesting that any such proceedings should be instituted, for the papers in the former application are now before us, and it appears from them that it was granted after ample inquiry and on full information. Neither do I see any ground for attacking the veracity of the allegation in Mr. Tilley's affidavit to which reference has been made. The section directs the Court to inquire "by taking the oath of the insolvent or otherwise" whether there are any creditors who have not assented to the composition, "and who by reason of absence from the Colony or other causes



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may not have proved or claimed against the said estate," meaning clearly who by reason of absence or some other similar cause have not had an opportunity of proving their claims. Mr. Tilley alleged that there were no such creditors and there is nothing to shew and no reason to believe that this statement was incorrect or that the present respondents were in any such position. It would be most unreasonable to allow local creditors to lie by, omit to prove on the estate, and after a composition has been proposed and accepted, and the necessary meetings held and notices given, to again lie by, allow the discharge to be granted, and then bring an action for the full amount of their debt. The appeal must be allowed and judgment entered for the defendant, with costs here and below.

SOLOMON and COLE, JJ., concurred.

[Appellant's Attorneys, COGHILAN & COGHILAN.  
Respondents' Attorneys, H. C. & J. C. HAARHOFF.]

## WARD vs. GRIQUALAND WEST D. M. CO., LD.

### *Neighbouring Claimholders.—Negligence.*

*A. agreed to sell his claims in a mine to B., but retained the right to work them for a certain period. During this period his work was stopped by a fall of ground attributable partly to his own negligence and partly to that of B. If there had been no negligence on the part of B., the fall for which A. was himself responsible would in itself have been sufficient to prevent him from working the claims or deriving any profit from them during the period in question. Held, on these facts, that A. was not entitled to recover damages for detention from B.*

1887.  
March 12.  
May 1.  
Ward vs.  
Griqualand  
West D. M. Co.

This was an action between neighbouring claimholders in the Dutoitspan Mine, arising out of the following facts. On October 8, 1887, the plaintiff sold the defendant company certain twenty-one claims, adjacent to those of the company, on the condition that he should be entitled to continue

hauling from and working the said claims up to the end of the month. The declaration alleged that on October 15, while the plaintiff was in full work in the said claims, a large quantity of reef and also some blue ground fell into the said claims from certain high ground the property of the defendant company, and which they had allowed to remain for a long time unworked and in a very high and noticeably dangerous state. The plaintiff further alleged that the said fall was caused by the negligence and improper conduct of the defendants in allowing this ground to be and remain in the state aforesaid, and by their negligence and improper working down and blasting of the said high ground. In consequence of the said fall the plaintiff's hauling gear was broken, and his plant destroyed or covered up and rendered useless, and he was unable to do any further work in the claims, and lost the profits which he would otherwise have derived from such working from the date of the fall, October 15, till November 1, on which date the defendant company took possession of the said claims under the aforesaid agreement. For this loss of profits and the loss of his plant and gear the plaintiff claimed £860 as damages, but the claim, so far as it related to the plant and gear, was abandoned at the trial, as it appeared that this property had been included in the sale of the claims to the defendant company. The defendants in their plea said that the fall complained of consisted entirely of blue ground, and not of reef, as alleged by the plaintiff, and denied that they had been guilty of any negligence in not working down high ground or otherwise. They further pleaded that, in or about April 1887, the plaintiff had purchased from them certain high ground, which it then became his duty to work down and remove at his own cost and risk. He however neglected to do so, and allowed the ground to remain in a high and dangerous condition, and thereby caused the fall complained of. The said fall was caused entirely by the neglect and default of the plaintiff himself and the defendants were in no way responsible or liable for the same. The plaintiff joined issue on this plea.

From the evidence it appeared that the plaintiff's claims were situated immediately below a high block of ground,

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May 1.  
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 ———  
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partly floating reef and partly diamondiferous ground, which went by the name of "Mount Ararat." The whole of this block, at the time of the occurrences complained of, belonged to the defendant company, except a portion of claim No. 227, situated immediately above the plaintiff's anchorage, and which for convenience in working, and as a protection from other ground behind and above it, the plaintiff had previously purchased from the defendant company. His anchorage, *i.e.*, the poles on which his hauling gear was fixed, was at the time of the fall either in claim 227, as he said, or, as the defendant company asserted, in their adjacent claim 238, where the plaintiff had placed it by their permission. The fall, according to the plaintiff, came almost entirely from the defendants' portion of claim 227, and consisted mainly of floating reef, while a small amount of blue ground was brought down by it from the lower portion of the same claim which he had purchased as above set forth. The fall amounted to about 1300 loads of ground, and broke the plaintiff's hauling gear, buried his trucks and other plant, and completely prevented him from resuming work. According to the plaintiff's witnesses, the high ground it left untouched was not in a dangerous condition, and the cause of the fall was blasting by the defendants on Mount Ararat in the early part of October, and the plaintiff did not complain of any negligence previous to that date. None of the plaintiff's witnesses, however, saw or heard the blasting of which they complained, and which they alleged must have taken place mainly on a Sunday, October 9, basing their opinion partly on the appearance of the ground on the following day, and partly on certain admissions alleged to have been made by the defendants' manager. These admissions, however, he explicitly denied, and explained that the ground which the plaintiff supposed to have been blasted had really been picked down, and that there had been no blasting in this part of Mount Ararat for some considerable time previous to the fall, and in this assertion he was fully corroborated by other employés of the defendant company, and among them by the man who had charge of their blasting operations. The witnesses for the defence alleged that the ground which fell into the plaintiff's claims was almost entirely blue

ground from the face of 227 which he had purchased, though some of them admitted that possibly a small proportion of it might have fallen at the same time from some of their adjacent high ground, from which a considerable quantity also fell simultaneously into their own lower claims. They attributed this fall to natural causes, and the opening of a "greasy vein," traces of which were still visible, and which was said to have been the immediate cause of the slip. A good deal of evidence was also taken on various points of detail, the effect of which, so far as material, is sufficiently set forth in the judgment reported below. With regard to damage the evidence was that the plaintiff had lost the benefit of about thirteen days' working, during which period he could have hauled from 400 to 500 loads per day of the net value of about 2s. 6d. a load. At the close of the case the plaintiff was recalled by the Court, and stated that if the fall had not exceeded 700 loads, or about half the quantity which actually fell, it would have taken him eight or nine days to remove it, and it would not have been worth his while to purchase and erect fresh gear in order to resume working for the rest of the month.

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*Guerin*, for the plaintiff, contended that the evidence shewed that the bulk of the fall came from the defendant company's high ground, and that it was attributable to their dangerous and negligent blasting. He also argued that, even irrespective of negligence, the owners of the ground which fell were liable for the damage sustained, and referred to *Leo and others vs. Ramsbottom*, 1 C. A. 40, and *Standard D. M. Co. vs. Compagnie Française*, 4 H. C. 29, per BUCHANAN, J.P., at p. 33.

*Lange* (with *Hopley, C.P.*), for the defendants, contended that the plaintiff was bound to prove negligence, and that he had failed to prove it, either in blasting or otherwise, and that the action must therefore fail. The allegations as to blasting had been disproved, and the plaintiff had never complained of any risk or danger from Mount Ararat, and had admitted in his evidence that the high ground was not in itself dangerous. The plaintiff had bought from time to time part of the face of this high ground for his own con-

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venience, and the fall consisted of the ground he had himself bought and left high. Moreover, he had obtained an anchorage in one of the defendant's claims at his own risk, and in all the circumstances the defendants could not be held liable for the fall.

*Guerin* replied.

*Cur. adv. vult.*

*Postea* (May 1),—

LAURENCE, J.P., said :—This action was heard at the end of last term, and as it involved some questions of considerable difficulty, both as to the facts and as to their legal effect, the Court found it necessary to reserve judgment.

The plaintiff sues the defendant company for damages sustained by a fall of ground in the Dutoitspan Mine in October last. The plaintiff was the owner of twenty-one claims in that mine, which some time previously he had purchased from the Standard Company. These claims were adjacent to those of the defendant company, and on October 8 he sold his claims to them on condition that he should be allowed to continue working them up to the end of the month, when he was to give the defendants possession. He accordingly continued working till October 14, but on the morning of the 15th a fall occurred which broke his hauling gear, covered his plant, and prevented him from doing any further work. He now sues the defendants for the loss sustained by his being prevented from working between October 15 and October 31. There was also a claim for damages to the gear, &c., but as it appeared that this had been purchased by the defendant company together with the claims, that portion of the demand was abandoned at the trial. The question to be determined is whether the defendants are liable for the loss of the profits of working during the period in question which the plaintiff would have derived had it not been for the fall, profits which, according to the plaintiff's evidence, which was not contradicted, would have amounted to about £600. The plaintiff's case is that the fall consisted of reef, mixed with blue ground, that it fell



from certain high ground, the property of the defendants, and that the cause of the fall was that the defendants had allowed this high ground to be and remain for a long time in a high and dangerous condition, and had also negligently and improperly worked down and blasted portions of the said high ground. The defendants plead that the fall consisted entirely of diamondiferous blue ground, and did not include any reef, and that it came from a portion of the high ground situated in claim 227, which the plaintiff had some time previously purchased from the defendants. The plea mentions two claims, 226 and 227, but it was admitted at the trial that the plaintiff's replication on this point, confining the purchase to portion of 227, was correct. The defendants deny that they were guilty of negligence either in not working down or in blasting down their high ground, and say that the fall was caused by the plaintiff leaving the ground he had himself acquired in a high and dangerous condition.

The fall of ground and the consequent interruption of the plaintiff's mining operations being thus admitted, the questions with which we have to deal are, (1) Where did the fall come from, and, so far as it may help to decide this question, what was the nature of the ground which fell, and (2) What was the cause of the fall? The latter is indeed the really important question, for, wherever the fall came from, if it was the result of the defendants' negligence, they are liable for the consequences; and wherever it came from, if there was no negligence on their part, I am of opinion that they are not liable. It is no doubt the fact that in the case of *Leo and Others vs. Ramsbottom* and also in the case of *Standard D. M. Co. vs. Compagnie Française*, cited at the bar, Mr. Justice BUCHANAN did express an opinion that a claimholder was liable for the results of a fall of his ground into his neighbour's claims, irrespective of negligence; but in the former case no adhesion to this view was expressed by the Court of Appeal, which affirmed the decision of the then Recorder on the express ground that negligence had been proved, and in the latter case the expression of opinion appears to have been of the nature of an *obiter dictum* and not necessary for the purposes of the decision. I have already expressed my own opinion on this point in the case of *Hall vs.*

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*Compagnie Française*, 1 H. C. at p. 493, as being in accordance with the view taken by Mr. Brown, Acting Recorder, in his judgment in the case of *Goode and Smith vs. Hall*, where he says:—"In my opinion the owner of a claim is bound to work it in a reasonable manner and so as not to injure the property adjoining. Each of two claimholders may work his own claim in the ordinary and proper way, and if from such working, and without negligence on the part of the one, an injury is occasioned to the property of the other, the former would not be liable" (*ibid.* App. at p. 530). With regard to the recent case of *Standard Bank vs. Bissett*, 4 H. C. 256, I will only remark that in that case the question of liability as between neighbouring claimholders was not directly raised, but so far as it is in point it is entirely in accordance with this view. These observations, it should perhaps be added, of course merely refer to the general principles of the law of negligence, and their application to questions of this kind, irrespective of any statutory liability which may be imposed on claimholders by the bye-laws of the mining board or other regulations of a similar kind.

Has then the plaintiff succeeded in proving that the fall of which he complains is attributable to the negligence of the defendant company? The evidence shews that his claims were situated immediately below a high and unworked block of ground—partly floating reef, partly yellow and partly green or "hardbake" or poor blue ground—which we have often heard of in this Court in mining cases from Dutoitspan and which for many years has gone by the name of Mount Ararat. At the time of this fall the whole of this high block belonged to the defendant company except a portion of 227, immediately above his own claims, which the plaintiff for convenience of working had purchased from them. He seems to have bought it, as I have said, not so much for the purpose of working it down as to facilitate the working of his own claims at a lower level. There is some dispute as to the number of loads on 227 which the plaintiff purchased, as to the nature of the ground he bought, and as to the amount of it which he actually worked down. These purchases were made on more than one occasion, the plaintiff as he worked down buying, so to speak, the correspond-

ing face immediately above him, and the measurements were taken very roughly, and as the ground was not purchased for the sake of its intrinsic value its nature was probably not very closely examined. It is true that the plaintiff gave 2s. a load for it, but I think we shall not be wrong in taking Mr. Blackbeard to be correct in saying that at all events a good deal of this ground was stuff which, whether you call it "blue" or "green" or "hardbake," would indeed pulverise in time but was not worth the expense of working. Another minor point in the case is where the plaintiff's anchorage was situated at the time of the fall. He says that it was in this claim 227, but will not swear that the defendants' witnesses, who say it was in their adjacent claim 238, are wrong. Assuming however that it was placed by permission of the defendant company in one of these claims, I do not think it has been proved that this permission was given on the express condition that the defendants should not be responsible for the results of any fall of ground, stopping the plaintiff's working, or that it can be held, in the absence of such condition, that the mere fact that the plaintiff with the defendants' consent had his anchorage in their ground is in itself sufficient to exempt them from the consequences of any damage which he might sustain by reason of their negligence.

Now on October 8, which was a Saturday, the agreement of purchase, already referred to, was made. It was made in Kimberley between the plaintiff and two of the directors of the defendant company, Messrs. Nind and Hart. Mr. Blackbeard, their managing director, appears to have been present while the matter was being discussed, but to have left for Dutoitspan before it had been agreed that the plaintiff should retain possession till the end of the month. When he left he was under the impression that he was to take over the plaintiff's claims on the following Monday. The plaintiff's case is that, being under this impression, and having decided to shift the anchorage to another position, he gave orders to do certain blasting in Mount Ararat on the following day, the Sunday, and that by this blasting the block was shaken with the result that the fall took place six days afterwards. Now in the first place Mr. Blackbeard

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distinctly states that, while it is quite true that on the Sunday he believed the claims would be handed over to him the next day, and made his arrangements accordingly, at the same time he had no intention of shifting the anchorage but intended to continue working in the same way as the plaintiff had done and with the same gear. It is not therefore in itself probable that he would have ordered or allowed any blasting which would in his opinion have been likely to produce a fall or imperil the plaintiff's hauling gear and working plant; but without further discussing these probabilities it is sufficient to remark that the plaintiff's case, so far as it rests on the alleged blasting on Mount Ararat on Sunday, October 9, has entirely failed. That blasting has not been proved; none of his witnesses either saw or heard it; and this part of the case rests entirely on an inference derived from the fact that on the following day a good deal of ground was seen to have been brought down, which in the opinion of the plaintiff's witnesses must have been blasted, and on certain admissions, which Mr. Blackbeard and some of his employes are alleged to have made. The defendants' evidence is however perfectly clear and I think convincing on this point. It is to the effect that the ground in question was not blasted but barred or picked down; that no shot was fired on Mount Ararat on that Sunday; and that the alleged admissions must be the result of a misunderstanding and must refer to certain shots which were put into some of the lumps after they had been barred down and at a place remote from the scene of the fall, and which shots cannot possibly have affected the stability of the block. Now the plaintiff in his evidence based his case entirely on this alleged blasting on October 9, and said distinctly that he did not complain of any previous negligence, neither did he consider that the block, though high, was in a dangerous condition, or that he would have sustained any damage had it not been for this blasting. Our finding on this question might therefore from the plaintiff's own point of view be regarded as disposing of the whole case; but it seems to me that it would scarcely be equitable to pin the plaintiff down too closely to this expression of personal opinion, but that we ought to regard the case as a whole, both as raised on



the pleadings and as presented in evidence. Now with regard to blasting some of the plaintiff's witnesses take a rather broader view and, while regarding the blasting on October 9, which we have found to be imaginary, as the *causa proxima* of the fall of October 14, they also partly attribute this fall to blasting by the servants of the defendant company on previous occasions. Now the last time previous to the fall that they blasted on Mount Ararat is shewn to have been on the previous Sunday, October 2, and I presume this must be the blast referred to, in such vague and uncertain terms, by the witness Scott. As to this blast, it is sufficient to observe that, as is proved by Watson, the defendants' blaster, and also by their claim-manager, Irwin, it was put in under orders from the mining inspector to remove danger; it was not a heavy shot, and was fired very carefully, their own gear being immediately below; and I think it is impossible to hold that the fall of October 14 is proved to have been caused by this shot a fortnight before. Then with regard to the blasting in the tunnel and uptake, that was some distance off; it was necessarily from the situation of an extremely light character; the work was discontinued in the month of September and not resumed before the fall, and in my opinion it cannot be regarded as having in any way tended to produce it.

The case, so far as negligent and improper blasting is concerned, must therefore fail; but the fall must have had a cause; and the question remains whether, as is put in issue on the pleadings, it can be attributed to the defendant company leaving their high ground unworked and dangerous, or is rather to be ascribed to the plaintiff having done the same thing with regard to the portion of 227 which he had himself purchased. Now to leave this high block so long unworked, while they were themselves working down and their neighbours were doing the same thing immediately below, seems in itself to constitute some *prima facie* evidence of negligence on the part of the defendant company; and their own conduct in attempting to work it down by tunnelling into it seems further to shew that they were alive to this danger, and to the advisability of making an effort to remove it; but the fact appears to be that they found the job too tough

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for them, and gave up the attempt for the reasons mentioned by their witnesses.

Then again there is the very significant letter addressed by the mining inspector on October 12 to the defendant company, of which at the close of the case a copy was put in by consent to complete the correspondence, and which clearly shews the serious view which that official took of the danger arising from Mount Ararat, "standing like a peak surrounded by open working places on low levels," and also that this view was explicitly brought to the notice of the managing director of the defendant company, who cannot indeed have failed, with his large experience as a digger, to have been long aware of the existence of this danger—a danger which, as the working levels deepened, must have been constantly increasing. Then lastly on this point we have the evidence of the defendants' own witnesses, who went much further towards proving negligence than those called for the plaintiff. The defendants' witnesses attribute the fall to "natural causes," the operation of which was precipitated by the opening out of a greasy vein. But these natural causes were not in the nature of *vis maior*; they were rather the natural consequence of the defendants allowing this high peak or pinnacle to remain exposed and unworked, and with its foundations more or less undermined by the digging carried on below.

On these grounds, without going more into detail, if it were shewn that the fall came substantially from the defendants' portion of Mount Ararat, I should feel little difficulty in ordinary circumstances in holding them responsible for the consequent damage. But we have here to face the question of where the fall actually did come from. As to the quantity, I think we may safely take it at about 1300 loads, that being the estimate of both Tucker and Dale, the surveyors called by either side. The question of where it came from is one of considerable difficulty; but on the whole, after carefully considering the evidence, and having the advantage of an inspection of the *locus in quo*, we are of opinion that the bulk of the fall into the plaintiff's claims came from claim 227, though perhaps, as admitted by Mr. Dale, some portion may have come from the defendants'

claim, 226, and even from others of their claims above and beyond in the same direction. Then taking the fall to have been mainly from 227, did it come from the plaintiff's or from the defendants' portion of that claim? On the whole, considering the nature of the ground and all the circumstances, we have arrived at the conclusion that the fall came in about equal proportions from the ground the plaintiff had purchased and from that which the defendant company had retained; that the fall from the plaintiff's own high ground did not amount to only 200 loads, the quantity which the plaintiff himself admits came from that quarter, but was not less than 600 or 700 loads; and that it has not been proved that the defendants' ground brought down the plaintiff's with it, or *vice versa*, but the probability is that the whole fell simultaneously owing to the opening out of a greasy seam or vein on the face of this high and exposed block. Now probably this finding of fact, at which we have arrived, is the only finding which could cause any serious difficulty as to the conclusion to be drawn from it. If we found that the fall came substantially from the ground of either the plaintiff or the defendants, or that the fall of the one brought down that of the other, there would be no difficulty in holding the defendants liable in the one event and not liable in the other. The difficulty, on the facts as found, mainly arises out of the agreement of October 8. It might indeed be argued with some plausibility that by that agreement the defendants bought the plaintiff out, and resumed the ownership of the whole of 227, and that they took the plaintiff's high ground as it is said *cum onere*, and were thus responsible for the whole of the subsequent fall. But this argument seems to be met by the fact that, when the fall occurred, the defendants, though they had repurchased the property, had not resumed possession, and this high ground, so long as the plaintiff was working below, had not reverted to their control, and thus, having no power to deal with it, they were not responsible for its condition. Or again, if part of the fall had come from the defendants' ground, and part from that of a third party, the defendants would clearly have been responsible for their share of the damage. Once more, had

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it not been for the agreement of sale, the plaintiff might have properly contended that, in accordance with his evidence when recalled by the Court, it would have taken him eight or nine days to remove the ground which, as we find, fell from his own portion of 227, and a similar time to remove the defendants' portion of the fall, and that he was entitled to charge them for the damages caused by this additional detention. But as the facts stand the plaintiff admits that a fall of 600 or 700 loads would have equally smashed his gear, and it would have taken him most of the time yet remaining to him under the agreement (which, reckoning Saturdays as half days, I calculate to have been only twelve and a half working days) to prepare for removing and get rid of the fallen ground, and it would not have been worth his while to buy fresh gear and start anew for the extremely short period during which he would have been entitled to work. The consequence is that, altogether independently of any fall from the defendants' ground, or of any negligence on their part, the plaintiff would have been unable to obtain any profits from or any beneficial use of his claims during the period for which he sues. The defendants cannot be said to have even impliedly warranted him quiet enjoyment for that period except from any interference on their own part with such enjoyment. As the plaintiff's own conduct in leaving his high ground unworked and dangerous produced a fall which in itself was sufficient to prevent him from making anything out of the claims before the determination of his possession, it cannot be said that the defendants have done him any damage. This position might be illustrated by supposing the action to have been reversed, and to have been brought by the defendants on the same facts for damage sustained by the destruction of the gear they had purchased, owing to a fall occasioned by the plaintiff's negligence. It would apparently have been a good answer that their own portion of the fall would have equally destroyed the gear, without any contribution from the plaintiff's ground, and that therefore they had not sustained any damage caused by him. The result is that the action fails and, although the case in some of its aspects is undoubtedly one of some

hardship, no damage has been proved for which the defendants can be held liable, and the judgment of the Court must therefore be for the defendant company, and the costs must follow the result.

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SOLOMON and COLE, JJ., concurred.

[Plaintiff's Attorney, RHODES.  
Defendants' Attorney, D. J. HAARHOFF.]

### BRISTER & Co. vs. DUNNING AND ANOTHER.

*Practice.—Pleading.—Exception.—Joinder of defendants.—Inconsistent alternative claims.—Rule of Court 330.*

*Where a plaintiff alleged that he had let certain goods to A., who wrongfully detained them, and claimed their restoration and damages for the detention, and in the alternative alleged that, subsequent to the letting to A., he had sold and delivered the said goods to B., on an agreement that the purchase-money should be secured by promissory notes to be made by B. and endorsed by A., and claimed specific performance of this agreement by A. and B.; an exception to the declaration, on the ground that the alternative claims were inconsistent and embarrassing, was allowed with costs.*

This was an argument on exceptions. The plaintiffs alleged that on or about September 20, 1887, they let to the defendant E. H. Dunning certain household furniture for one month, of which he duly took possession, and retained possession after the expiration of the said term. On October 24 a verbal agreement was made between the plaintiffs, the said E. H. Dunning and his brother, the co-defendant R. B. Dunning, that the latter should purchase the said furniture from the plaintiffs for the sum of £250, payable by instalments, for which promissory notes, made by R. B. Dunning and endorsed by E. H. Dunning, were to be given to

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the plaintiffs. The furniture had accordingly been duly delivered by the plaintiffs to the defendant R. B. Dunning, but the defendants had failed and refused to perform their part of the agreement by making and endorsing the said promissory notes or paying the said instalments when due. The defendant R. B. Dunning had since disposed of the said furniture and the plaintiff, besides losing the benefit of the sale, had been unable to recover possession of it. Alternatively, the plaintiffs alleged that on the expiration of the period for which the furniture had been let to the defendant E. H. Dunning, as above set forth, he had neglected and refused to restore and wrongfully and unlawfully detained the same, whereby the plaintiffs had suffered damage. The plaintiffs claimed that the defendants be ordered to perform the agreement above set forth, and to make and endorse respectively the promissory notes above referred to, and alternatively they claimed an order on the defendant E. H. Dunning to forthwith restore the furniture or pay the sum of £250 its value and the sum of £50 as damages for its wrongful detention.

To this declaration the defendants excepted on the grounds that (1) the various parts thereof were contradictory to and inconsistent with each other, and vague and embarrassing; (2) alternative portions thereof were directed against different parties and were thus embarrassing and bad in law; (3) that two actions arising out of different causes of action against different persons were conjoined in the said declaration; (4) that it was generally vague, inartistic, embarrassing and bad in law. There was also an exception by the defendant E. H. Dunning to the claim against him for specific performance of the alleged contract to endorse certain promissory notes on the ground that no consideration was shewn or alleged or any binding contract set forth to endorse the said notes; but this exception, on an expression of opinion from the Court, was not pressed in argument.

*Hopley, C.P.*, appeared in support of the exceptions.  
The COURT called on



*Guerin*, for the plaintiffs, who referred to *Child vs. Stenning*, 5 Ch. D. 695, where it was held that it was not necessary that the alternative relief prayed against one co-defendant should be consistent with that prayed against the other.

[LAURENCE, J.:—The English Rules under the Judicature Act appear to allow alternative claims in some cases where they would not be entertained according to the practice of our Courts; but the case referred to was one of alternative claims, said to be inconsistent, against different defendants, while the present declaration contains alternative claims, which are clearly inconsistent, against the same defendant.] He also referred to *Whitehead's Trustee vs. Van Eyk*, 4 E. D. C. 4.

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LAURENCE, J.:—I think the declaration as it stands is clearly bad, setting up as it does causes of action which are mutually inconsistent. A plaintiff is bound to know his own case and to state truly and concisely, as laid down in the 330th Rule of Court, the right in which he sues and the nature, extent and grounds of his cause of action. Here the plaintiffs allege that they sold and delivered certain goods to A., and that they have been disposed of by him, and then go on to allege that, previously to and at the time of the said sale and delivery, these goods were in the possession of B., and have ever since been wrongfully detained by him. B. is sued for this wrongful detention of the goods and also as a surety on the agreement by which they are said to have been sold and delivered to A. It only requires to transpose the two claims—in which case the plaintiffs would first claim the restoration, together with damages for their wrongful detention, by one defendant, of goods for the purchase price of which they proceed to sue both the defendants—in order to make it palpable that such alleged causes of action are self-contradictory and wholly irreconcilable. In my opinion alternative and inconsistent claims of this kind are in the highest degree embarrassing and cannot be allowed. The Court would be willing to strike out whichever of the claims the plaintiffs might elect and permit the rest of the declaration to stand, but as it appears that they do not wish to be put to their election at once, the declara-

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tion must be quashed, with costs, liberty being reserved to the plaintiffs to declare *de novo*.

SOLOMON, J., concurred.\*

[Plaintiffs' Attorney, PLAYFORD.  
Defendants' Attorneys, CORYNDON & CALDECOTT. ]

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*In re* HOWELL'S ESTATE.

*Executor.—Removal.—Absence.—Ordinance 104, 1833.*

*Absence from the Colony is not in itself a sufficient ground for the removal of an executor.*

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Petition for the appointment of an executor. The petition set forth that in 1885 one J. S. Stuart was appointed to act as executor of the above estate, and that subsequently, on his leaving the Colony, W. M. Miller was appointed to act in his stead under a power of attorney from Stuart. Miller had also left the Colony for the Transvaal in December, 1886, and was still away. The only remaining property in the estate had recently been sold, and all the creditors now joined in this petition for the appointment of an executor in Stuart's stead to liquidate the estate and pass transfer of the property to the purchaser.

*Lange* moved for an order for Stuart's removal on the ground of his permanent absence. This application was purely formal and for the convenience of the creditors.

SOLOMON, J. :—This application cannot be granted. Stuart is still executor of the estate, and the Court cannot therefore appoint another executor. If an application were made to

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\* The plaintiffs subsequently filed a fresh declaration, and sued the defendant E. H. Dunning for detainee, abandoning their claim against the other defendant. The case came on for trial on May 14, when it was proved that the goods in question had been attached under a judgment, and so in satisfaction of a landlord's lien for rent, and an application for abolition from the instance was granted with costs.

remove Stuart on the ground of incapacity or refusal to act, the Court could entertain it. But it has been held that absence from the Colony is not in itself a sufficient ground for removal,\* and there is nothing to shew that Stuart declines to act any longer. Moreover, no notice of this application has been served upon him.

COLE, J., concurred.

[Applicant's Attorneys, GRAHAM & CARLISLE.]

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### MOSENTHAL BROS. vs. COGHLAN AND COGHLAN.

*Arrest.—Attorney and Client.—Practice.—Power to defend proceedings.—Rules of Court 8, 9, 28.—Judgment debt.—Set-off.*

*M. arrested F. for a debt secured by liquid documents. The writ having been discharged with costs, F. refused to set off his costs against the larger sum which he owed to M. and took out a writ for the amount. M. paid the amount claimed and thereafter applied to the Court to order C., who was F.'s attorney in the matter of the arrest, but who had filed no power from him to defend the proceedings, to refund the amount so paid. Held, that, while the writ ought not to have been taken out and an application to restrain its execution would probably have been granted, it could not be set aside and a refund ordered except after notice to F. of the application and that the application against C. must therefore be refused.*

*Semble, it is unnecessary in motion cases for the respondent's attorney to file a power with the Registrar.*

This was an application calling upon the respondents, a firm of attorneys, to shew cause why a certain writ of execution for the sum of £15 6s. 5d. taken out by them, purporting to act on behalf of the Fahey, should not be set aside on

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\* Cf. *Grobelaar's Trustee vs. Grobelaar's Executors*, Binn. 1879, 207.

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the grounds that the respondents had filed no power of attorney from Fahey to represent him in the matter, and further that the judgment for which the writ was issued had been already duly satisfied by set-off. The applicants also prayed for an order on the respondents to repay the amount which they had paid to prevent an attachment under the writ and to pay the applicants' taxed costs in the matter as between attorney and client. From the affidavits it appeared that Mosenthal Bros. arrested Fahey for debt but the writ was discharged with costs, the proof of his intention to leave the jurisdiction being insufficient. The respondents having made an unsuccessful application for the payment of these costs, together with damages for wrongful arrest, a writ for the costs was taken out, and the amount was then paid to the Deputy-Sheriff in order to avoid an attachment of the applicants' goods. It appeared that the respondents had filed no power from Fahey, who had been arrested by the applicants on a claim based on two liquid documents, amounting in all to £163 14s. The affidavit of the respondents stated that the applicants' attorneys had appeared at the taxation of the costs in question, and had raised no objection on the ground of the absence of a power from Fahey, and it was the practice for attorneys to instruct counsel in motions in the High Court without a power. There was also an affidavit of Fahey stating that he had instructed the respondents to act for him in the matter of the arrest and to issue the writ in question.

*Frames*, for the applicants :—The application is based on two grounds; firstly, no power to issue this writ was given to the respondents by Fahey, and secondly the judgment debt was previously satisfied by *compensatio*. In a case of this kind, a return of the money paid can be obtained on motion: *Brink, qq. Breda*, vs. *Voigt and Breda*, 1 Menz. at p. 539; *Maxwell vs. Graham and Haarhoff Bros.*, 1 H. C. at pp. 399, 400; Rule of Court 28. [LAURENCE, J.P.:—But the costs which you now seek to recover are costs which the Court ordered to be paid to Fahey, and must be presumed to have been received by him, and Fahey has not been joined as respondent.] The respondents do not deny that they have

obtained and still retain the proceeds of the writ. If fees are improperly obtained by an agent they can be recovered from him and it is unnecessary to sue the principal: *Steele vs. Williams*, 22 L. J. Ex. 225. This is a case of tortious exaction under wrongful process, for which the agent is responsible: *Pollock on Contracts*, 4th Ed. p. 555; *Fisher's Digest*, 1. 475, s. v. "Attorney," and the cases there cited of *Codrington vs. Lloyd*, 8 A. & E. 449, and *Bates vs. Pilling*, 6 B. & C. 38. [LAURENCE, J.P., referred to *Pullinger vs. Harsant*, 2 H. C. 111.] It is clear that the writ was wrongly issued and the amount due to Fahey for costs should have been set off against the liquid debt due by him to the applicants: *Trustees of Van Niekerk vs. Tiran*, 1 Juta, 358; *Voet*, 16. 2. 2. As to the necessity of filing a power, this is provided for by Rule of Court 9, and the respondents, having omitted to do so, had no right to issue process. [SOLOMON, J.:—The plaintiff's attorney must have a warrant to sue but it does not follow that a respondent's attorney must have a warrant to defend.]

*Hopley, C.P.*, *contra*, contended that the applicants had mistaken their remedy, and should bring an action for any damage they had sustained. Further, this was Fahey's writ, and he should have been made respondent. The writ was dead, having been voluntarily satisfied by the applicants. They should have applied for an interdict against its execution or failing that should now sue for damages. (Stopped *arguendo*.)

LAURENCE, J.P.:—I think this application cannot be entertained. It is impossible to accede to the contention, pressed to the length it has been in argument, that an attorney and his client are so completely identified that it is unnecessary to make the latter a party to, or to give him notice of, any application which his opponent may desire to make to set aside any alleged irregularities which may have been committed by his attorney on his behalf and under his authority. If that were so, the attorney could be made respondent equally with the client, or to the exclusion of the client, in all interlocutory motions and applications. With regard to the absence of any power of attorney, I do not think much

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stress can be laid on this point. It may be convenient that such a power should in all cases be given, and it may be to the advantage of an attorney to require it, as a clear proof of the mandate which has been given him, and as evidence which will enable him to support any claim which he may eventually have to make against his client for disbursements incurred on his behalf. But it does not appear that the Rules of Court expressly require a power to be filed in cases like the present, and it is said not to be the practice to do so. At all events, if objection was to be taken on this ground it should have been taken when the bill of costs was presented for taxation. At the present stage, it is sufficient to observe that Fahey in his affidavit states that the respondents acted under his instructions and, if his ratification of their proceedings is necessary for their protection, that ratification has been clearly given. Now, with regard to those proceedings, I feel bound to express my opinion that the advice which the respondents gave their client to take out this writ, instead of allowing the amount of the taxed bill to be set-off against the larger debt evidenced by liquid documents, which, as is not denied, was due to the applicants, was wrong and erroneous advice. That, in circumstances like the present, the judgment debt is extinguished by compensation as well as by direct payment is perfectly clear from the authorities which have been cited, the passage in *Voet* and the judgment of the Supreme Court in the case of *Van Niekerk's Trustees vs. Tiran*. That being so, if the applicants had applied to the Court, or a Judge, for an order restraining the execution of the writ, there can be very little doubt that such order would have been granted. Instead of adopting that course they chose to pay the amount of the writ and now ask the Court to order a refund. It is however obvious that the Court cannot order a refund of the money until the writ is quashed or set aside, and it is equally clear that the writ was not the respondents' but Fahey's. The original order of the Court was that the writ for Fahey's arrest should be discharged with costs, the presumption being that Fahey had incurred certain costs and made certain disbursements to or through his attorneys which he was entitled to recover from the parties who had wrongfully had him arrested. That being

so, and the writ being Fahey's, it is clearly impossible for the Court to set it aside without notice to him, and without his having been made a respondent to the motion. The present application must therefore be refused and, the proceedings having been misconceived, the respondents are entitled to their costs.

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SOLOMON and COLE, JJ., concurred.

[Applicants' Attorneys, CALDECOTT & PHEAR.]  
[Respondents in person.]

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MYERS vs. SELIM.

*Bills of Exchange.—Proof of payment.*

A. B. and C. made an agreement which provided *inter alia* that A. should accept certain three bills of exchange, at one, two and three years respectively, which he was to give to B., and which were to be held by either B. or C., and not to be negotiated, transferred or assigned to any third party, A. undertaking to "pay or provide for" them at maturity. In accordance with this agreement, and on the same day, C. drew the bills to his own order, and endorsed them in blank, and A. accepted them and made them payable at C.'s office in London. A. afterwards went to Kimberley and duly remitted the amount of the first two bills to C. The amount of the third bill he remitted to B. direct, C. having meanwhile become bankrupt. B. afterwards sued A. on the first two bills, which he produced, and A. pleaded payment. His evidence, in addition to the above facts, was that B. was a money-lender and C.'s father-in-law. He also produced a letter from C., stating that he had with B.'s knowledge kept the amounts remitted to him and that he hoped B. would return the bills. There was also a letter from B. acknowledging the amount of the third bill and not containing any reference to the former bills. On these facts the Magistrate gave judgment for the plaintiff. Held, on appeal (SOLOMON, J., diss.), that the facts proved raised

*a sufficient presumption of payment or satisfaction to put the plaintiff on further proof, and that the judgment must therefore be altered to one of absolution from the instance, the question of costs being reserved.*

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Appeal from the Resident Magistrate of Kimberley. Selim, who was in business in London, sued Myers, a merchant at Kimberley, before the magistrate for £200 on two bills of exchange for £100 each, both dated August 25, 1884, and payable one twelve months and the other two years after date. These bills were drawn by one J. O. Schuler on the defendant, and made payable to the drawer's order, and by him endorsed in blank and accepted by the defendant, and by him made payable at 12, Hatton Garden, London, which was Schuler's place of business. The summons alleged that the plaintiff was the legal holder of the bills, which had been presented and dishonoured, wherefore the plaintiff prayed judgment for the amount of the said bills with interest and costs. The defendant pleaded payment. The plaintiff having put in the bills, the defendant was called and stated that he had known both Selim and Schuler for many years. Selim was a money-lender and Schuler's father-in-law. The bills had been passed in terms of a deed of agreement which he produced and which, after reciting *inter alia* that Myers was indebted to Schuler, who had assigned the debt and his security therefor to Selim, provided that in consideration of the premises Myers should give to Selim among other instruments the bills now in question, which bills, subject to certain provisions for redemption, were to be held and retained by either Selim or Schuler, and were not to be negotiated, assigned or transferred to any other person or persons, Myers undertaking to pay or provide for them at their respective due dates according to the terms and conditions of the agreement. The defendant went on to state that he had duly provided for the bills and held Schuler's receipts. Besides these two bills now sued on, there was a third bill, due a year afterwards, the amount of which the defendant had remitted direct to the plaintiff, Schuler having meanwhile failed in business. The defendant had never seen the plaintiff with reference to the deed which Schuler had brought

him to sign. He produced a letter from Schuler, dated August 29, 1887, in which he said, referring to the third bill:—"I am glad you remitted to Mr. Selim direct. I have kept the £200 which you remitted in '85 and '86, but hope nevertheless to get Mr. Selim to give you back the two bills. He knew all along that you had sent the money to me." The writer then went on to refer to his misfortune in business. There was also a letter from Selim to the defendant, dated August 26, 1887, acknowledging receipt of the £100 remitted for the third bill but not making any mention of the others. On this evidence the magistrate gave judgment for the plaintiff with costs, and the defendant appealed.

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*Guerin*, for the appellant, referred to the admitted fact that the amount of these bills had been remitted to Schuler at the place where they were payable and contended that, bearing in mind the relationship between Schuler and Selim, the terms of the agreement, and the unexplained delay in suing on the bills, the facts raised a presumption of acquiescence on the part of the plaintiff in the amount of the payments being retained by Schuler. The plaintiff was a money-lender by profession and, in the absence of some arrangement with Schuler, would have doubtless claimed payment from the defendant when the bills fell due, instead of waiting till after Schuler had become bankrupt. As the case was regulated by the English law of contract, the non-presentation of the bills at the place where they were made payable was not in itself a legal defence, but it was a significant fact in the case, as was also Selim's acknowledgment of the receipt of the amount of the last bill without referring to any antecedent debt. He referred to *Erlanger vs. New Sombrero Phosphate Co.*, 3 A. C. 1218, per Lord BLACKBURN at p. 1279, referring to *Lindsay Petroleum Co. vs. Hurd*, L. R. 5 P. C. 239, and also to *Taylor on Evidence*, § 146.

*Frames, contra*, said that while the defence now set up was acquiescence in the payment to Schuler, the only defence pleaded was that of payment to the plaintiff of which there was no proof whatever, and which in fact was negatived by Schuler's letter which the defendant had produced. The nature of Selim's profession and his relationship



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to Schuler were wholly irrelevant topics. If necessary he would ask the Court to remit the case to the magistrate for further evidence, when it could be shewn that the plaintiff had on two occasions demanded payment of these bills. He submitted that the defence had wholly failed and referred to *Levicks and Sherman vs. Eksteen* and *Truter vs. Heyns*, 1 Menz. 49; *Watermeyer vs. Neethling*, *ib.* 46.

*Cur. adv. vult.*

*Postea* (May 3):—

LAURENCE, J.P., said:—In this case the defendant was sued before the magistrate of Kimberley on two bills of exchange for £100 each, both made in August 1884, and due, the one in August 1885, and the other in August 1886. These bills were drawn by one Schuler and made payable to the order of the drawer, and are by him endorsed in blank. The defendant accepted them and made them payable at 12, Hatton Garden, London, which was the drawer's office or place of business. The plaintiff asserts that he is the legal holder and produces the bills. He also alleges presentation and dishonour. Of this no proof was given, but it is admitted that, the contract having been made by the parties in England, the *lex loci contractus* as to presentation applies, and that, by English law, no such proof is in a case of this kind required. The only defence pleaded is payment, and on the production by the plaintiff of the instruments on which he sues it is for the defendant to prove that plea, or at all events by his evidence to raise such a presumption of payment as to require rebuttal on the part of the plaintiff. The question is whether he has discharged that obligation. Now these bills were accepted in pursuance of an agreement which has been put in, and which was made on the same day as the bills, between the drawer, Schuler, the acceptor, Myers, and the present plaintiff. This agreement provided that Myers, for the consideration therein set forth, should "pay or provide for the bills at their respective due dates according to the terms and conditions" of the said agreement. The point has not been



argued whether the contract embodied in the bills must speak for itself, or whether it may be interpreted by the light of the simultaneous agreement under which they were made, which has been put in without objection, to which the plaintiff was a party and to the terms of which both parties have during the argument referred. If we look at the agreement we find that the only obligation of the defendant thereunder was "to pay or provide for" these bills at their due date, and it does not seem to be denied that the obligation of so providing for them has been duly discharged by him. It may, however, doubtless be contended that under his plea he is bound to prove not only that he provided for payment but that payment has been actually received by the plaintiff. Now I am inclined to agree with the magistrate when he finds, in the reasons he has appended to the record, that "Mr. Schuler was defendant's agent in regard to the receipt of this money which it was his duty to have paid over to the plaintiff." There is however the further question to be determined whether Schuler was not the agent not only of the defendant to receive but also of the plaintiff to pay over the money to him. It seems to me that the facts of the relationship between Selim and Schuler, of the money transactions which, as appears from the agreement, had passed between them, and of Selim being by profession a money-lender, are elements in the case not so wholly irrelevant as the learned counsel for the respondent appeared to consider and not to be so summarily dismissed as he did in his argument. Why did not Selim, a bill-discounter, present the bills for payment in the ordinary course? Why does he in such friendly terms acknowledge payment of the amount of the third bill, due in August 1887, without reminding his debtor that the former bills are long overdue and unpaid? Lastly, why does he wait till after Schuler's bankruptcy before taking proceedings against Myers? Now it is impossible for the defendant to prove what in the course of the last three years took place between Selim and his son-in-law or what was the state of accounts between them. But the questions which I have put are questions which require some explanation, and which could all be easily explained if the state of the accounts was such

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that Schuler retained these moneys with Selim's consent, possibly as a set-off for other sums, or in other words if Selim had consented to substitute Schuler for Myers as his debtor, and has only now attempted to depart from that arrangement in consequence of Schuler's bankruptcy. If this is the real state of the case, it also explains Schuler's expression of his hope that Selim would return the bills, which he knew all along that the defendant had provided for—a hope which would be obviously groundless unless Selim had in some form or other received the equivalent of the amount of the debt thus secured. There is also the further fact that by the agreement Selim was entitled to assign or transfer the bills to Schuler, but to no one else, and the evidence as a whole produces on my mind the impression that it is by no means improbable that some such assignment or transfer may in fact have taken place. For these reasons I am on the whole of opinion that the defendant has raised a sufficient presumption of payment to put the plaintiff on some further proof beyond the mere production of the bills. No doubt the appellant has placed himself in a difficulty by not taking the ordinary business-like precaution of insisting on the return of the bills against his remittances; and I am not prepared to say that if this were a provisional case I should hold the probabilities to be so clearly in his favour as to justify the refusal of provisional sentence. But the judgment of the Court below is not provisional but final in its nature; and if we confirm that judgment, and if there are really equities in the defendant's favour entitling him to resist this claim, he will have no opportunity of establishing them and will be remediless in the premises. On the other hand, the case is not in my opinion one for a final judgment in the defendant's favour, and the plaintiff ought to have an opportunity of producing such further evidence as he may be advised. With regard to the application which was made to the Court to remit the case to the magistrate in order to enable the plaintiff to prove that he had made previous application to the defendant to pay these bills, I should have been willing to accede to it if I thought that proof of such application would conclude the matter; but on the whole I think that such evidence,

though probably relevant and material, would not have been decisive, and therefore the adoption of such a course might only entail useless delay and additional expense. I think the proper course is to alter the judgment to one of absolution from the instance, which will enable the plaintiff to begin *de novo* either in the Magistrate's Court or, as I think would be more convenient, in this Court, and to produce his own evidence, and also if he can do so that of Mr. Schuler, on the points which have been raised. If the plaintiff proceeds in this Court by way of application for provisional sentence, the defence can be set out on affidavit and replying affidavits filed in the usual manner, and the Court will then be in a position to decide the matter. If the parties prefer to renew their litigation before the magistrate—I say the parties, for it will be borne in mind that the defendant under sect. 3 of Act 21 of 1876 and sect. 6 of Act 43 of 1885 can, if he thinks fit, have the case removed into this Court—the necessary evidence can be taken on commission or by affidavit if the magistrate thinks proper and the parties agree to that course. These, however, are of course merely suggestions, which the parties will adopt or not as they may be advised. For the reasons given I am of opinion that the judgment of the Court below, which was for the plaintiff with costs, must be altered into a judgment of absolution from the instance, the question of costs being reserved.

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SOLOMON, J.:—This action was brought in the Court of the Resident Magistrate of Kimberley for the recovery of the sum of £290 upon two bills of exchange for £100 each. The bills are both dated August 25, 1884, and are payable the one twelve months and the other two years after date. They are drawn by J. Otto Schuler upon the defendant, Herman Myers, and are accepted by him, payable at 12, Hatton Garden, London, which is the place of business of Schuler, the drawer. The plaintiff is the holder of these bills, and at his request they were on February 27, 1888, presented for payment to the defendant, and the answer received was that they were already paid. Thereupon the present action was instituted by the plaintiff. To the plain-

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tiff's claim the defendant has pleaded payment, and upon this plea issue is joined, so that the simple question which we have to determine is whether the defendant, upon whom lies the onus of proof, has satisfactorily proved that the bills have been paid. But before considering that question I would merely point out in passing that no objection is now raised with regard to the presentation of the bills, as it was very properly admitted by the appellant's counsel that the acceptance in the words "payable at 12, Hatton Garden," is a general acceptance, and consequently that it was not necessary for the plaintiff to present the bills for payment at that place. The defendant then having pleaded payment of the bills, it is necessary for him to prove that the money was paid either to the holder of the bills or to some person authorised to accept payment on his behalf. Now the first fact which strikes one as very remarkable, if it be true that the bills have been paid, is that these bills are still in the hands of Selim. One would have supposed that in the ordinary course of business, if the money had been paid, the bills would have been given up by the holder, whereas we find that, after a lapse of nearly three years and two years respectively from the time when the payments are alleged to have been made, these bills are still in the hands of Selim. Now this fact in itself raises a very strong presumption against the case set up by the defendant. No doubt it is a presumption which is capable of being rebutted, but in my opinion the rebutting evidence would require to be very clear and strong. What then is the evidence given on behalf of the defendant in proof of his plea? The only witness called is the defendant himself, who says that he remitted the money for the first bill when it fell due to Schuler at 12, Hatton Garden, and that when the second bill fell due he paid the amount to Schuler in person. Now it is quite clear that the payment of the money to Schuler, who was the agent appointed by the defendant to pay the money to Selim, and to get back the bills, is not such a payment as will discharge the defendant. As I have already said, the defendant, in order to establish his plea, must prove payment either to Selim, the holder, or to some one authorised by Selim to receive payment on his behalf. Conse-



quently it is not sufficient for the defendant to shew merely that he remitted the money to Schuler; he must go one step further, and prove in addition either that Schuler paid the money to Selim, or that Selim had authorised Schuler to receive the money on his behalf. Now the second alternative may in my opinion be at once dismissed, as I am wholly unable to see that there is any evidence to shew that Selim had appointed Schuler his agent to receive the money. What then is the evidence relied upon to shew that Selim received the money from Schuler? Of direct evidence there is none; but it is argued that this is the only conclusion which can be drawn from all the circumstances of the case. The main facts from which this conclusion is drawn are the following: First, the fact that Selim is a money-lender and that it is therefore very unlikely that he would allow so long a period of time to elapse after the due dates before taking steps to recover the money due upon these bills; then, the fact that on August 26, 1887, Selim wrote a letter to Myers acknowledging the receipt of a draft for £100 in payment of a third bill for that amount without mentioning the fact that the two previous bills were still unpaid; and the further facts that Selim is Schuler's father-in-law, and that Selim took no steps against Myers until after the insolvency of Schuler. Now it would be idle to deny that these facts do raise a certain presumption in favour of the case that Schuler did pay the money to Selim. But after all it is merely a presumption, and in my opinion this presumption is wholly rebutted by the evidence furnished by the defendant himself. The defendant puts in a letter, dated August 29, 1887, received by him from Schuler, and upon which he relies as evidence to shew that he had paid the money to Schuler. And certainly that letter does acknowledge the receipt of the two sums of £100 in 1885 and 1886, but it does more than that. For instead of Schuler stating in that letter that he had paid over the money to Selim, he confesses that he himself had kept the £200. What then becomes of the presumption of payment to be deduced from the facts to which I have alluded? In my opinion that presumption is swept away by this letter put in by the defendant himself. But then it is said this same letter con-

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tains the following words: "but I hope nevertheless to get Mr. Selim to send you back the two bills;" and it is argued that an inference is to be drawn from these words to the effect that Selim had in some way or other received satisfaction from Schuler for these bills, otherwise why should Schuler express the hope of getting these bills from Selim. Now I must say that this appears to me to be a somewhat forced inference, and one which I cannot draw from these words. For if this were the fact surely, considering the contents of this letter, Schuler would have stated the fact clearly in the letter, and I think he would not merely have expressed the hope of getting back the bills, but that he would have assured Myers that he was entitled to the bills and that he would get them back for him. I rather read these lines as expressing a vague hope on the part of Schuler that Selim, who was his father-in-law, would assist him in the mess that he had got himself into. In the face of this letter, then, from Schuler I do not see how I can come to the conclusion that he paid the money to Selim. For before I could come to that conclusion I should have to satisfy myself not only that Selim was perpetrating a fraud in suing upon these bills which had been paid, but also that Schuler, the agent of Myers, was acting in collusion with Selim to defraud Myers of the sum of £200. I should have to find that Schuler, having paid Selim this money, deliberately abstained from getting back the bills from him, and that in the letter of August 27, 1887, he falsely charged himself with a breach of trust when he said that he had kept the money himself. Charges of fraud of so serious a nature as this would require in my opinion to be supported by much stronger evidence than we have in the present case. But then the defendant's counsel argues further that there was what he calls acquiescence on the part of Selim. I must say I do not quite follow what he means by the use of the word acquiescence in this way. If he means that Selim agreed to Schuler receiving and retaining the money on his account, then of course it is merely another way of saying that Selim had been paid, and I have already set forth my reasons for not coming to that conclusion. But if he means merely that Selim knew that Myers had sent the money to

Schuler, and delayed to take steps to obtain the money from Schuler, then the simple answer is in the first place that this is not the defence set up in the plea, and, secondly, even if it were set up, that it is not a good answer to the plaintiff's claim. By delaying to press his claim for the money against Schuler, Selim did not debar himself from calling upon Myers to pay the money due upon the bills. It was the duty of Myers to pay the bills at maturity to the holder, and the mere fact that Selim has for some reason or other delayed to obtain payment is no defence to the present action. In my opinion therefore the defendant's plea has failed, and I think that the Resident Magistrate was right in giving judgment for the plaintiff. The case no doubt is a hard one for the defendant. He has, as it seems to me, been the victim of the dishonesty of his own agent, who having received the money from him kept it for his own purposes instead of paying it to the holder of the bills. There is only one other observation that I wish to make upon this case. I think it is a pity that the plaintiff did not in the Court below call for the letters, which his counsel says were written by him on at least two occasions, pressing the defendant to pay these bills. Such letters would in my opinion have strengthened his case, and personally I should not have been indisposed to have sent the case back to the Resident Magistrate for the purpose of taking evidence on this point in order to clear up what is undoubtedly something of a difficulty in the case. However, my brother Judges did not think that the production of such letters would alter their view of the case, and as I myself am satisfied with the plaintiff's case, independently of such letters, we did not think it necessary to send the case back to the Resident Magistrate.

COLE, J. :—By a certain deed of agreement executed in London a few years ago it was recited that Myers being indebted to one Schuler, and Schuler being indebted to Selim, his father-in-law, Myers should accept certain bills of exchange to be drawn on him by Schuler, and Selim should be the holder of these bills. Myers appears to have been only temporarily in England, having his place of business

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here. The bills were drawn upon, and accepted by him, "payable at No. 12, Hatton Garden, London," Schuler's office. I must presume that the acceptance in this form met with the approval of Selim; because otherwise he might have insisted on an open acceptance—that is an acceptance having no particular place of payment, or he might have insisted on his own house or place of business, or his own bankers, as the place of payment. An open acceptance would scarcely have suited him as he must have known that Myers, when the bills fell due, would be six thousand miles away from the place where the bills were drawn. So that to my mind his being content with the bills accepted in the form they were is very strong evidence that he intended the payments to be made at Schuler's office. That the payment of the two bills now in action was duly made at Schuler's office is not denied; but it is said that such was not payment to the holder of the bills. It is true that the mere fact of payment at the place stipulated in the acceptance will not, in all cases, exonerate the acceptor from the claim against him of the rightful holder of the bill, especially if he knows who the holder is. But, as I have said before, I look upon Selim as having, if not chosen, at all events assented to, the place where payment was to be made. It may be said that Selim was not bound to send to No. 12, Hatton Garden for the amounts of the bills as they fell due, and that he was legally entitled to hold Myers at all times liable to him. But is it conceivable that he did not inquire and did not know that the bills had been paid? For my own part I confess that I entertain little doubt of his knowing all about the payments. It is sworn that Selim is a money-lender and that Schuler is his son-in-law. That a money-lender should allow a bill to be overdue for two or three years, without taking legal proceedings to recover the money, is to my mind the height of improbability, but that a money-lender and his son-in-law should have no objection to make their debtor pay twice over presents no such improbability to me. It is only after Schuler's bankruptcy that the latter confesses (or rather affirms) that he has not paid over the money to his father-in-law, and it is only some time after that event that the plaintiff sues on the bills. I

confess that if the case had come before me in the first instance my judgment would have been for the defendant absolutely. But as there are hints that further evidence may be forthcoming on the plaintiff's side, and as it may be very desirable that the testimony of both Selim and Schuler should be heard if they choose to tender it, I am willing to adopt the view of the JUDGE PRESIDENT and alter the judgment of the Resident Magistrate to one of absolution from the instance.\*

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[Appellant's Attorney, DEWHURST.  
Respondent's Attorneys, CALDECOTT & PHEAR.]

### *In re* ESTATE OF GOLDBERGER.

*Insolvency.—Release.—Ord. 6, 1843, §§ 25, 107.*

*Where in an estate under £75 in value there had been only one meeting of creditors, and the trustee then elected had never been confirmed, and no account had been filed, the Court refused an application for release under sect. 107 of Ord. 6, 1843, on the ground that no such application could be granted until after the third meeting of creditors had been held.*

Benjamin Goldberger applied for the release from sequestration of his estate, which had been voluntarily surrendered in 1882. It having appeared to the Master that the assets of the estate were under £75 in value, only one meeting of creditors had been held and the trustee then elected had realised the assets of the estate, but his appointment had never been confirmed and no account had been filed. The assets realised were of nominal value, and the only creditors who had proved on the estate consented to its release from sequestration.

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\* On appeal to the Supreme Court, this judgment was reversed and that of the Resident Magistrate restored.

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*Hopley, C.P.*, for the petitioner, said this was an application for release under sect. 107 of the Insolvent Ordinance. [LAURENCE, J.P., pointed out that the section provided "that no such application to release any such estate from sequestration under the provisions of this section shall be capable of being granted until after the third meeting of creditors as hereinbefore mentioned shall have been held;" in the present case there had been only one meeting of creditors.] He submitted that where the first was also the final meeting, in estates under £75 in value, the position was the same as if, in an ordinary estate, the third meeting had been held. He referred to *In re Bower*, 1 Jut., 49, where an insolvent had been discharged, though no creditors had appeared at the meetings and no trustee had been appointed. In that case, as had been ascertained by inquiry from the Master of the Supreme Court, the order actually made was for the release of the insolvent. He submitted that the present was an analogous case and, after some discussion, asked that the matter might stand over in order to produce further authority if possible.

*Postea* (May 11),—

*Hopley, C.P.*, referred to the provisions of sect. 25 of the Insolvent Ordinance and again submitted that the words in sect. 107, "the third meeting of creditors as hereinbefore mentioned," must include by implication cases where, under sect. 25, the estate had been wound up at the first meeting. He referred to *In re Reid*, 3 H. C. 75, where no trustee had been elected, and in consequence there had been no third meeting, and the Court had refused rehabilitation but JONES, J., had suggested that "the difficulty might be avoided by applying for a release." [SOLOMON, J.: That was only an *obiter dictum*, and there is nothing to shew that the attention of the learned Judge was specially directed to the provisions of sect. 107.] In circumstances like the present there must be some method of obtaining relief. [SOLOMON, J., referred to Act 15, 1859, § 4, and suggested that, as this insolvency had occurred before the enactment of Act 38, 1884, § 14, there was nothing to prevent the insolvent from



applying for his discharge under the above section of the Act of 1859.]

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LAURENCE, J.P.:—It is a peculiar feature in this case that the appointment of the trustee has never been confirmed and no liquidation account has been filed. It has been suggested that confirmation by the Court is really not required in the case of a trustee elected at the first and final meeting of creditors in an estate under £75 in value, under the provisions of sect. 25 of the Insolvent Ordinance, and that the trustee in such cases has full power to liquidate the estate under the direction of the Master and creditors as provided by the section. Without expressing any opinion on this point, it would certainly seem necessary that an account should be filed and confirmed, and that this should be done before application is made for the release or discharge of the insolvent. However that may be, the present application is based on sect. 107 of the Ordinance, which distinctly lays down that no application under that section "shall be capable of being granted" until after the third meeting of creditors. The words, "the third meeting as hereinbefore mentioned," cannot be construed as including cases where there has been no third meeting; and it seems to be nowhere provided that the holding of a first and final meeting in small estates under sect. 25 shall be equivalent for all purposes to the holding of the third meeting in other estates. I am therefore of opinion that, whatever other remedies may be open to the petitioner, the Court has no power to grant the present application.

SOLOMON and COLE, JJ., concurred.

[Petitioner's Attorneys, COGHILAN & COGHILAN.]

## MULLER vs. L. &amp; S. A. EXPLORATION COMPANY, LD.

*Practice.—Pleading.—Exception.—Alternative relief.—Inconsistent allegations.—Rule of Court 330.*

*A plaintiff alleged in his declaration that the defendant was in use and occupation of a certain stand by his permission and as his tenant, and in the alternative that the said occupation was against his will and notwithstanding an order which he had obtained for the defendant's ejection, and claimed alternative relief on these statements; held, on exception, that, while the plaintiff could draw alternative conclusions of law and claim relief corresponding thereto, the declaration as it stood was embarrassing and must be amended by the omission of the inconsistent allegations of fact therein contained.*

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Argument on exceptions. The plaintiff company, owners of a certain stand in the District of Kimberley, alleged that the defendant had from April 1, 1886, to February 29, 1888, occupied the said stand by their permission and claimed a certain sum for such use and occupation and for rates paid on behalf of the defendant "as tenant of the said stand" at his instance and request. In the alternative they claimed for use and occupation up to October 5, 1886, and alleged that on that day the defendant was ordered by the Court to give up possession of the said stand to the plaintiffs, but had nevertheless up to the present date remained in possession against their will, and received all the issues and profits and enjoyed the beneficial use and occupation thereof, whereby the plaintiffs had sustained damage, and lost mesne profits, for which they claimed £100. To this declaration the defendant excepted as follows:—

1. In that the various portions thereof are contradictory to and inconsistent with each other and that the declaration is in this and other respects vague, embarrassing and bad in law.

2. In that it appears from paragraphs 6 and 7 of the declaration that there has since the 5th of October, 1886, been a judgment of ejection from the said premises in favour of the plaintiffs against the said defendant and that in spite of the judgment the defendant has continued in

wrongful occupation of the said premises. And the defendant submits that the action for such occupation since the said date is misconceived and that the plaintiffs in respect of such occupation are not entitled to the remedy now sought by them. Wherefore the defendant prays that the said declaration or such parts of it as are bad in law may be quashed with costs.

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*Hopley, C.P.*, in support of the exceptions, said that the allegations of the plaintiff company that the defendant was in occupation with their permission and against their will at the same period were inconsistent, contradictory and embarrassing. [LAURENCE, J.P.:—They might have given permission, either express or tacit, but have done so unwillingly.] As the declaration stood, the defendant could not plead to it without admitting in one portion of his plea what he would have to deny in another. The plaintiffs must know their own case, and should be put to their election as to whether, for the period from October, 1886, they sued the defendant for use and occupation or for trespass; he referred to *Brister & Co. vs. Dunning*, *suprà*, p. 83. As to the second exception, the plaintiff should have enforced the order of ejectment alleged and could not now sue for subsequent occupation. [LAURENCE, J.P.:—If they chose not to enforce the order, and waived their right of ejectment, and the defendant remained in occupation, surely they have an action for the subsequent profits.]

*Frames*, for the plaintiff company, submitted that the facts alleged were not contradictory and it was competent for a plaintiff to claim alternative relief. It could not always be foreseen what view the Court would take of the facts proved at the trial, and it was allowable under the present rules to draw conclusions of law inconsistent with each other. He referred to *Bagot vs. Easton*, 7 Ch. D. 1; *Thoroton vs. Whitehead*, 1 M. & W. 14; *Cobb vs. Stokes*, 8 East, 358; *Ryall vs. Rich*, 10 East, 48.

LAURENCE, J.P.:—This is one of those cases in which, on one party delivering his pleading, his opponent is naturally disposed to ask himself the question, "Am I not entitled to feel embarrassed by this document?" and if he is able to convince himself that such is the case, he, also naturally,

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proceeds to file an exception. Now it may be said that it is the business of a good pleader to embarrass his opponent; but he must endeavour to do so in a legitimate manner and, so to speak, in accordance with the rules of the game. In the present case I am not prepared to say that the plaintiff's declaration is actually bad in law; but I think it may fairly be contended that, as it now stands, it is rather an embarrassing statement for a defendant to be compelled to plead to. I will not say much with regard to the old case of *Thoroton vs. Whitehead*, which was not under the present rules of pleading and which is very shortly and rather obscurely reported; but the true rule in cases of this kind seems to be clearly indicated in the judgment delivered by Lord Cairns in the case of *Bagot vs. Easton*, which is quite in accordance with the provisions of our 330th Rule of Court, and with the recent decision of this Court in the case of *Brister vs. Dunning*. The effect of that rule I take to be that the plaintiff is bound to know his own case and to set forth truly and concisely, *inter alia*, "the nature, extent, and the grounds of the cause of action, complaint, or demand;" he is then entitled to draw such conclusions of law as may properly be deducible therefrom. The facts alleged must not be contradictory or irreconcilable with one another; but there is nothing to prevent a plaintiff from, after stating certain facts and claiming certain relief, going on, as in *Bagot vs. Easton*, to allege additional facts, and from them to deduce his right to additional or alternative relief. That is not exactly the course which has been adopted in the present case, and the allegations as to the defendant's occupation having been at the same time with the permission of the owner and against his will, though possibly capable in a somewhat strained sense of reconciliation, are, I think, allegations of an embarrassing and *prima facie* inconsistent character. That being so, the best course will be to order the declaration to be amended by the omission of the inconsistent allegations of fact therein contained. The plaintiff company can declare again, setting forth simply the facts on which they rely, and drawing from them such conclusions of law and claiming such relief, alternative or otherwise, as they may think fit. The defendant will have the usual time

to plead to the amended declaration and the costs will be costs in the cause.

SOLOMON and COLE, JJ., concurred.

[Plaintiff's Attorneys, CALDECOTT & PHEAR.]  
[Defendants' Attorneys, COGHLAN & COGHLAN.]

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## MOIR vs. WATTS.

*Principal and agent.—Broker.—Commission.*

*W. placed certain house property in the hands of M., a broker, for sale. M. introduced K. and obtained for him an order to view the property, which at first he declined to buy, but, about a month afterwards, purchased direct from W., at a price which was substantially the same as that which W. would have received, after deducting M.'s commission, if the sale had originally gone through. M. sued W. for commission, and the magistrate, after hearing the plaintiff's evidence to the above effect, granted absolution from the instance. Held, on appeal, that the evidence disclosed a prima facie case, and that the judgment of absolution must therefore be reversed and the case remitted to the magistrate for further hearing.*

R. J. Moir, a licensed broker at Kimberley, sued G. Watts before the Resident Magistrate of Kimberley for £15 as agreed brokerage on the sale of a certain house. The plaintiff's evidence was that the defendant had placed the house in his hands for sale and agreed to pay a commission of five per cent. The plaintiff thereupon communicated with one Kuhn, who said he would give £500 for the property if it suited him. He then spoke to the defendant, who had previously stated that his lowest price was £550, with the result that the defendant agreed to sell at £500 and give a commission of £15 upon the gross amount of the sale. Plaintiff then obtained an order from defendant for his buyer to view the house and disclosed his name. Kuhn

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went to see the place and did not then decide to buy, but about three weeks afterwards bought it direct from Watts for £480. Watts refused to pay any commission on the ground that the plaintiff had not personally introduced Kuhn. Plaintiff, who stated that he had taken a good deal of trouble in negotiating the sale, admitted in cross-examination that he never submitted any offer from Kuhn to Watts. Kuhn gave evidence to the effect that he wanted to buy a house, and communicated with the plaintiff, who shewed him the defendant's property, and obtained for him an order to inspect it. After inspection he told Moir that he thought £500, which was the highest price he was prepared to give for a house which suited him, was too much for the defendant's house, and that he intended to build one for himself. About a month after he changed his mind about building and went to the defendant and asked if he still had the house pointed out by Moir, and in the end bought it for £480. He had not known anything of the property before Moir brought it to his notice. This was the case for the plaintiff and, on application by the defendant's attorney, the magistrate granted absolution from the instance, with costs, holding that the plaintiff's services terminated when Kuhn told him he would not buy the property, and that the subsequent sale was effected without the instrumentality of the plaintiff. The plaintiff appealed.

*Hopley, C.P.*, for the appellant, contended that the evidence shewed that the plaintiff had been instrumental in bringing about the sale and was therefore entitled to a commission. The defendant would never have sold to Kuhn had it not been for the plaintiff bringing them together. He referred to *Addison on Contracts*, 7th ed. 711; *Green vs. Bartlett*, 32 L. J. C. P. 261; *Fisher's Digest*, 9th ed. vol. vi. 15, 16, s. v. "Principal and Agent." [LAURENCE, J.P., referred to *Peckover vs. Goldschmidt & Co.*, 1 H. C. 59, and the cases there cited of *Mansell vs. Clements*, 9 L. R. C. P. 139, and *Lyons vs. Town*, H. C., not reported.]

*Guerin*, for the respondent, relied on the reasons given by the magistrate and argued that, nearly a month having elapsed from Kuhn's original refusal to purchase before any-

thing further was done, Moir's mandate had terminated and he could not claim any commission. Moir had never submitted any offer from Kuhn to Watts. He referred to the judgment of BUCHANAN, J.P., in *Peckover vs. Goldschmidt*, at p. 64, and to *Jansen & Co. vs. Spence*, 4 Juta, at p. 152, where the CHIEF JUSTICE said: "If a broker is employed to sell, and does not sell, he cannot claim any commission, no matter what trouble he has been put to."

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LAURENCE, J.P.:—I think this appeal must be allowed. The present case differs from that last cited in that the defendant has effected the object for which he employed the plaintiff as broker. He has sold his house, and on the authority of the cases, cited in *Peckover vs. Goldschmidt*, of *Mansell vs. Clements* and *Lyons vs. Town*, I think it is clear that where a sale has been effected, and the broker introduced the parties in the first instance, and was instrumental in causing the transaction to go through, he is entitled to a commission for his trouble, even although the terms of purchase should ultimately be settled without his intervention. In the present case Kuhn distinctly stated that he knew nothing of this property before Moir brought it to his notice and, when he relinquished the idea of building a house for himself, he went to Watts and asked if the house which Moir had pointed out was still for sale. Watts then sold him direct for £480 the property which he had previously authorised Moir to sell for £500, out of which he was to pay him £15 as commission. I am of opinion that on this evidence a *prima facie* case has been made out, which requires an answer, and the judgment of absolution from the instance cannot be sustained. The appeal must therefore be allowed with costs and the case remitted to the magistrate for further hearing.

SOLOMON, J.:—I am of the same opinion, as I think that the evidence for the plaintiff tends to shew that this sale was really effected through his instrumentality as broker. At first I felt some difficulty owing to the difference of price, the plaintiff having failed to induce Kuhn to purchase at the price at which the property was placed in his hands.

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But this difficulty is removed by the case of *Mansell vs. Clements*, where it appears that the house was sold direct by the owner for a price considerably lower than that at which it was placed in the hands of the plaintiff, a house agent, to sell at, and nevertheless the plaintiff was held to be entitled to a commission on the sale.

COLE, J., concurred.

[Appellant's Attorneys, COGHLAN & COGHLAN.]  
[Respondent's Attorney, D. J. HAARHOFF.]

### BANK OF AFRICA vs. CRAVEN, N. O.

*Mining Board.—Receiver.—Act 11, 1867, § 6.—Act 18, 1886, § 11.—Appropriation of payments.—Interest.—Acquiescence.—Costs.*

*The debt due by the Kimberley Mining Board upon which interest is to be reckoned, as provided by Acts 11 of 1867 and 18 of 1886, consists of the original debt together with the interest accrued due thereon previous to the filing of their claims with the master by the creditors of the Board.*

*The proceeds of rates levied to liquidate the said debt must be applied in the first instance to payment of current interest and then to reduction of the principal.*

*Where a creditor of the Board had accepted and acquiesced in various payments made on account by the receiver on an erroneous basis, the Court refused to order immediate payment of the balance due on a readjustment of the accounts, but directed the receiver to credit the plaintiff with such balance and follow the correct method in future payments.*

*Where the relief obtained by a plaintiff could have been equally obtained by means of a special case, the Court allowed only such costs as would have been incurred if a special case had been prepared.*

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This was an action in which the plaintiff bank sued the defendant, in his capacity of receiver of the Kimberley Mining Board, for payment of the sum of £1565 12s. 0d.

They also claimed certain declarations as hereinafter set forth, together with general relief and costs of suit. It appeared from the declaration that, on October 19, 1885, the Court had ordered a rate to be levied, under the provisions of the Public Bodies Debts Act 11 of 1867, and the subsequent Acts 19 of 1883 and 22 of 1885, to meet certain liabilities of the Kimberley Mining Board, and had further directed an inquiry into the amount of the said debts to be held before the Master, as provided by sect. 4 of Act 11 of 1867. As result of this inquiry the Board had been found to be indebted to the plaintiff bank in the sum of £53,648, of which £40,996 represented the principal debt and the residue consisted of arrears of interest then accrued due. The defendant had been appointed receiver under sect. 9 of Act 11 of 1867, and from time to time had levied rates imposed by the Court and made payments on account to the creditors of the Board, the last payment previous to the issue of summons in this case having been made on August 22, 1887, when it appeared from an account furnished by the defendant to the plaintiffs that the balance due and owing to them was £28,146. From this account it appeared and it was the fact that no interest had been calculated or allowed by the defendant on that portion of the debt proved by the bank which consisted of arrears of interest then due, and also that no payment had been made in reduction of the current interest accrued due upon the remaining part of the said debt, *i.e.*, on the original principal, since the filing of the bank's claim. The bank contended and the defendant denied that it was the defendant's duty to calculate interest at 6 per cent. on the whole of the debt proved and not merely on the original principal, and to apply the payments made by him in the first place to the satisfaction of the amount of current interest due at the date of payment on the said debt of £53,648, or the balance thereof for the time being unpaid, and then to the reduction of the said debt or balance thereof. The bank alleged that, by reason of the wrong method of calculation adopted by the defendant, the sum of £1565 12s. 0d., claimed in this action, was due and owing to them on the aforesaid 22nd of August, 1887, in addition to the aforesaid balance credited to them by the defendant.

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The plaintiffs further alleged that there was no express or specific appropriation or assignment of the payments made by the defendant from time to time and that, in the absence thereof and independently of the duty by law imposed upon the defendant, the said sums must be taken to have been tacitly appropriated in the manner claimed by them. They claimed :—

1. A declaration that the plaintiffs are entitled to have interest at the rate of £6 per cent. per annum calculated by the defendant in his said capacity upon the whole of the said debt of £53,648 15s. 6d. from November 21, 1885, the date of filing of their claim of debt as aforesaid or the balance thereof for the time being remaining unpaid.
2. A declaration that the plaintiffs are entitled to have all payments hereafter to be made by the defendant in his said capacity on account of the said debt applied in the first place towards payment of the amount of current interest due at the date of any such payment upon the balance of the said debt at such date and then towards the reduction of the said balance.
3. That the defendant may be ordered forthwith to pay to the plaintiffs the said sum of £1565 12s. so due and owing as aforesaid with interest thereon at the rate aforesaid from August 22, 1887.

The defendant while maintaining, as stated above, the correctness of his method of calculation and appropriation of payments in reduction of the principal debt, further pleaded that payment on this basis had been duly accepted and adopted by the several creditors of the Board, including the plaintiffs. He admitted that if the method contended for by the plaintiffs were correct the amount claimed would be due to them. He further pleaded that at various periods he rendered to the plaintiffs accounts wherein he expressly appropriated the payments made on account and in reduction of the principal debt of £40,996, and denied that the plaintiffs were entitled to claim any payment on account of interest until the said principal was paid off and satisfied. The plaintiffs joined issue on the defendant's plea.

It appeared from the accounts annexed to the declaration, the evidence of Mr. Hector, the manager of the Kimberley branch of the plaintiff bank, and the correspondence put in, that nine dividends had been paid by the receiver to the creditors of the Board up to August, 1887, the first having been made in September, 1886. It was not, according to



Mr. Hector's evidence, till December, 1886, that the bank ascertained that the dividends were not being calculated on the full amount of their claim as above set forth. Correspondence ensued in which the bank asserted and the defendant denied the claim for interest. Mr. Hector admitted giving receipts for the dividends as payments on account but denied that he had acquiesced in the mode of payment. He also admitted that the defendant had explained that if the system contended for by the bank were adopted it would make very little difference in the amount of the interim dividends paid to each creditor, as the claims of the other creditors would be increased *pro ratâ*, and that this explanation might have influenced the bank in not pressing their contention at an earlier date. Some of the creditors, it should be mentioned, as the defendant pointed out in the correspondence, were the owners of rateable property, and were thus entitled to set off their claims against the rates levied, and if they were allowed interest thereon the result would be to defer the period at which they would have to pay the whole of their rates in cash. The bank had admitted that "there was a doubt about compound interest," and the defendant stated that in his method of payment he had followed as nearly as possible the practice in insolvent estates and liquidations, which he considered to be the fairest plan for all parties. The manager in his evidence admitted that there had been an express appropriation of payments by the defendant but denied that it had ever been accepted by the bank. It also appeared that the bank had made various suggestions as to the best course to be adopted, some of which differed from the contention now set up by them, they having at one time proposed that the principal sum, as they regarded it, of £53,648 should be first paid off and the interest account left for subsequent adjustment.

*Guerin*, for the plaintiffs, contended that the question of compound interest did not enter into this case, and referred to Act 11, 1867, § 6, and Act 18, 1886, § 11. By these Acts the Legislature had laid down that the debts due by public bodies, at the time of filing the claims, "with interest thereon," were to be fully satisfied. Moreover, the principle

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of the Roman-Dutch law against allowing compound interest was subject to certain exceptions. He referred to *Van Leeuwen*, tr. Kotze, II. 60, 61, and *Van der Keessel*, § 548, who there spoke of "the prohibition against compound interest on private debts," which he submitted would not cover debts owing by a public body. [SOLOMON, J.:—I think the distinction intended must rather be between private debts and those due to the State.] As to the claim for a readjustment of the accounts to date, in compliance with a suggestion from the Court he would not press that portion of the case and would merely ask for an order affirming the correctness of the principle contended for by the bank and enjoining its adoption for the future.

*Lange*, for the defendant, said that the Act of 1886 must be read by the light of that of 1867, and submitted that it had never been contemplated that compound interest should be allowed, and that the expression "debts proved" must refer to the principal debt proved before the Master exclusive of interest accrued thereon. He referred to sect. 33 of the Insolvent Ordinance and argued that, in accordance with the insolvent law, the principal should first be paid off and then the interest subsequently accrued. [LAURENCE, J.P., observed that in an insolvent estate the assets for distribution were of limited amount but in cases under the Public Bodies Debts Acts the claims of the creditors had to be "fully satisfied." SOLOMON, J., said that, even if the provisions of the Ordinance applied, the section quoted appeared to be adverse to the defendant's contention, and inquired whether the general principle that interest on debts should be first dealt with was not clearly established.]

*Guerin*, in reply, on this point referred to *Van der Linden*, p. 268, where it was laid down that "in debts which bear interest, the payment must be applied in reduction of the interest in the first place, and afterwards to the principal," and to *Wolhuter vs. Zeederberg*, 3 H. C. 437, per JONES, J., at p. 440.

LAURENCE, J.P.:—In this case three questions have been submitted for the decision of the Court. In the first place, what is the sum upon which interest has to be paid by the

defendant, in his capacity of receiver of the Mining Board under the Public Bodies Debts Acts? In other words, is the debt upon which interest is to be reckoned in round numbers £41,000, as alleged by the defendant, or is it over £53,000 as urged by the bank, that is to say the original debt of £41,000, together with the interest accrued up to November, 1885, when the bank filed their claim with the Master? The second question is whether the bank are entitled to have all payments made by the receiver applied in the first instance to the reduction of the current interest, or whether they should be applied first to the reduction of the principal sum, leaving the current interest to be carried to a suspense account and subsequently dealt with. Thirdly, if the plaintiffs are right on their first two contentions, are they entitled to a retrospective order, readjusting the past accounts, and, as the result of such readjustment, to immediate payment of the sum of £1565, being the difference between the amount actually paid to them by the receiver and that which they would have received on the method which, as they contend, ought from the first to have been adopted by him in making payments on account? Now to deal first with this last claim, I do not think that the bank have proved their right to this payment, to make which I presume it would be necessary for a special rate to be levied. Before this action was brought they had received nine dividends, extending over nearly a year, paid on the receiver's basis of calculation, of which the evidence and correspondence shew that they were perfectly well aware. The action and the inaction of the Bank in this matter, and the vacillation and uncertainty as to their own position which appears from the correspondence, in my opinion disentitle them, after so much delay and so long a period has elapsed, to an order entailing great inconvenience and altering the distribution which has actually been made. In fact, it seems clear that the reason why this claim has not hitherto been pressed, and may now be regarded as waived, is that the bank acquiesced in the explanation given by the defendant that, even if it had been allowed, its operation would have been such as to make no substantial difference in the distribution of the proceeds of the rates which have been levied and in the amount of the interim

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dividends which the bank has hitherto received. Passing then to the other portions of the claim which, although there has been delay in bringing them forward, the bank cannot be regarded as in any way estopped from now raising, I am on the whole of opinion that the contention of the plaintiffs is correct. As to the first point, no doubt the general principle of the Roman-Dutch law is against the allowance of compound interest, and interest on the sum of £12,000 odd, representing the difference between the claim of £53,000 filed with the Master and the original debt of £41,000, may be regarded as *primâ facie* coming within that prohibition. But notwithstanding that general principle we have here to interpret the express words of a statute, which may perhaps be in conflict with the general principles of the common law, but by which we are none the less bound, and which in my opinion are quite free from ambiguity. Sect. 6 of Act 11 of 1867 provides *inter alia* for the application of the proceeds of rates levied under the Act in payment of the claims of creditors "until all the debts proved, with interest thereon, shall be fully satisfied." Sect. 11 of Act 18 of 1886 is still more explicit and lays down that "in regard to the Kimberley Mining Board debt due at the time of the passing of this Act, the Court shall levy such rate from time to time as it may in its discretion think proper to fully satisfy such debt with interest at the rate of six per cent. per annum, calculated from the time of the filing of the claims with the Master," within the period thereafter provided. Now the bank's claim as proved and admitted by the Master was for £53,600, and, no matter how it was made up, that was the debt due by the Board to the bank, upon which interest at the rate of 6 per cent. must be reckoned from the date of filing the claim. Then, as to the second point, the question whether the payments made on account are to be applied in the first instance, as contended by the plaintiffs, to the reduction of the interest on the debt, or, as the defendant contends, in reduction of the capital, the ordinary mercantile practice appears to be to first pay off interest, and this practice is supported by the authority of the passage quoted from *Van der Linden* and other authorities cited by JONES, J., in the case of *Wolluter vs. Zeederberg*. It is contended that in the



present case there has been a special appropriation of payments made by the defendant, as representative of the debtor, in reduction of the capital account; but on this point I quite agree with the argument of counsel for the plaintiffs that there has been and in the special circumstances could be no appropriation by the debtor, and that the receiver is merely the officer of the Court, and so to speak the conduit-pipe through whom the debt must be paid in accordance with the ordinary principles and in the order laid down by the authorities cited above. The result is that the Court will make both the first and second declarations claimed by the plaintiffs but will dismiss the third claim, for immediate payment of the sum of £1565, which sum must, however, be added to the amount to be credited to the plaintiff bank in the defendant's books. It has been argued that the bank, having laid by, are not entitled to their costs; but although there has been considerable delay in the prosecution of their claim, there has been no such misconduct as to move the Court to depart from the ordinary rule as to costs following the result. The relief, however, which the bank has actually obtained could have been equally well obtained by means of a special case, and the Court will therefore award the plaintiffs only such costs as would have been incurred if a special case had been prepared, a course to which, on the points on which the plaintiffs have succeeded, it appears that the defendant was willing to consent. The defendant's costs will be costs in the liquidation.

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SOLOMON, J.:—I concur in the judgment which has been delivered. I do not think that the bank, after the course which they have adopted and the time which has elapsed, are now entitled to claim a readjustment, on the basis for which they contend, of all the payments which have hitherto been made. That basis, however, is I think clearly the correct one upon which future payments should be made. I doubt very much whether the rule against compound interest has any application in a case like the present. If a creditor chooses to lie by when payment is due to him, he has no right to claim interest on interest; but if a debtor fails to discharge his obligation at the due date, and the creditor



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has to sue, the Court always allows interest *a tempore moræ*. That is practically what has happened here, and the Master, in my opinion, was quite right in allowing the bank's claim for interest up to the time of proving the debt, and the total amount of the debt thus constituted is the amount for which, with interest thereon at 6 per cent., the Board is liable to the bank. This liability it became the duty of the receiver to reduce in the ordinary manner, applying his payments first to keeping down the current interest, and then applying the balance in reduction of the capital. I think that, quite independently of the statute, this is the proper and regular principle, as has been shewn by the authorities quoted, to apply in such a case as the present. The bank are therefore in my opinion entitled to the declarations they claim as to the method of calculation to be adopted by the defendant in liquidating this debt.

COLE, J., concurred.

[Plaintiff's Attorneys, CALDECOTT & PHEAR.]  
[Defendant's Attorney, D. J. HAARHOFF.]

L. & S. A. EXPLORATION COMPANY, LD. vs. BULTFONTEIN  
MINING BOARD.

*Abandonment of Claims.—Mining Board.—Act 19, 1883.*

*G. was a registered claimholder in a diamond mine, where there was no reservation of minerals or precious stones in favour of the Crown. He agreed with E., the owner of the soil, to take a lease of his claims for five years, with the right to renew, but did not actually take out a lease, and his rent fell into arrear before the expiration of the term. Two years after the term had expired, and the lease not having been renewed, he sent the mining board notice of his intention to abandon the claims, which were still registered in his name, and the board, on E. declining to undertake the liabilities of a claimholder in respect thereof, procured their registration into its own name and took possession of them. E. brought an action against the board, claiming cancellation of this registration and an*

*order on the board to quit possession. Held, that the claims had been legally abandoned under Act 19 of 1883, and that the board was therefore entitled, under the provisions of that Act, to maintain its possession thereof.*

The plaintiff company in this action were the owners of the farm Bultfontein, on which the Bultfontein Mine is situated, and the title of which is not subject to any reservation of precious stones and minerals in favour of the Crown. The declaration alleged that in December, 1887, the defendant board wrongfully and unlawfully procured itself to be registered in the books of the Registrar of Claims of the said mine as the holder of certain seven claims in the mine, the property of the company, and took possession of the said claims, the numbers of which were specified in the declaration. The said board had since then wrongfully kept possession of the said claims, and prevented the plaintiffs from using or dealing with them, whereby they had sustained damage to the amount of £31 10s. 0d., being at the rate of £1 10s. 0d. per claim per month, which sum was claimed by the plaintiffs, together with an order that the registration of the said claims in the name of the board be cancelled, and the board be compelled to quit and deliver up possession of the same. The defendants pleaded that Bultfontein was a duly proclaimed mine, and subject to all the provisions of the law regarding mines upon land the title to which was not subject to any reservation of precious stones and minerals in favour of the Crown. They admitted that the board had, in December, 1887, become the registered holders of the claims in question, and were still in possession of them, which possession they alleged to be of right. The plea proceeded as follows:—

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3. In or about the month of September, 1887, and not before, the said claims became and were abandoned according to law, and to the effect that the said claims had been and became abandoned was thereafter duly given to the plaintiff company in terms of sect. 78 of Act 19 of 1883.

4. The plaintiff company did not within thirty days of the receipt of such notice, or at all, signify its willingness, in manner provided by the said section, to take upon itself the said statutory responsibilities of an ordinary claimholder in respect of said claims.

5. The said claims therefore became the property of the Bultfontein

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Mining Board, which is the Board representing the claimholders of the said mine.

6. The said Board thereafter procured registration of the said claims into its own name, as it was entitled to do, and is still in occupation of them, which is the grievance complained of.

The evidence was to the effect that previous to 1880 disputes occurred between the plaintiff company as owners of the Bultfontein mine and the claimholders therein as to the rent or licence-money to be paid by the latter. In that year a draft form of lease and articles of agreement were prepared, by which the various claimholders agreed to take leases for a period of five years from September 1, 1880, at a monthly rental of 30s. for each claim with one acre of depositing site attached. Among those who entered into this agreement and signed the draft lease was Mr. Goldschmidt, who had previously been the holder of the claims now in dispute, paying 10s. 6d. a month as licence-money therefor. Mr. Goldschmidt did not actually take out a lease but paid the agreed rental of 30s. a month up to May 31, 1883, since when he had paid nothing, and in 1884 had informed the manager of the plaintiff company that he was not in a position to do so. The period for which leases had been granted having expired on August 31, 1885, and no lease having been taken out or renewal applied for in respect of these claims, a note to that effect had been inserted in the register of claims at the plaintiffs' request. The plaintiff company contended that these claims had never been abandoned, but had reverted to the company on Mr. Goldschmidt failing to renew his lease, and did not admit that they were strictly speaking claims at all, as they were no longer assigned for mining purposes, and did not appear as such on the company's plans of the mine. It appeared that Mr. Goldschmidt considered that he had practically abandoned the claims in August, 1885, but, on being informed by the mining board that until he sent formal notice of such abandonment he would be held liable for rates, he wrote to the Inspector of Mines on September 26, 1887, as follows:—"My attention has been directed by the Registrar of Mines to the necessity of giving you notice in writing of the abandonment of claims in Bultfontein registered in my name. I regret that this

was not done in 1885; I thought then it was sufficient to notify the fact to the owners. I now beg to inform you that I have abandoned the following claims in Bultfontein (giving the numbers) as from August 31, 1885." On receipt of this letter Captain Erskine, the Inspector of Mines and Chairman of the Bultfontein Mining Board, as the officer duly appointed by Government to give notice of abandonment of claims in the Bultfontein Mine, under the provisions of sect. 78 of Act 19, 1883, gave the plaintiff company notice of abandonment of these claims in terms of sect. 65 of the Act, and at the same time gave notice of the abandonment to the Registrar of Mines. The plaintiff company having declined to recognise the validity of the notice of abandonment or to take upon themselves the responsibilities of claimholders, the claims in December, 1887, were registered in the name of the defendant board, in the place of Goldschmidt, who up to that date had remained the registered claimholder.

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*Leonard, Q.C.* (with him *Frames*), for the plaintiff company, pointed out that as their title was admitted on the pleadings the *onus probandi* really lay with the defendants. They rested their case on an alleged abandonment in September, 1887, "and not before," in consequence of which they asserted that the claims were now legally vested in the board. The provisions of Act 19 of 1883 with reference to abandonment had not been complied with, as when Goldschmidt gave notice he had no title to or interest in the claims, which had reverted to the plaintiff company in August, 1885, and, although his name appeared on the register as a claimholder he was not "the registered and rightful owner" in terms of sect. 65. The term "owner" according to the law of this Colony was strictly construed: *Kimberley Public Gardens Committee vs. Colonial Government*, 5 *Juta*, 316. According to the terms of agreement put in, the company was not bound to renew the leases of claimholders whose rent was in arrear three months after their expiration, as in the present case. If it was the intention of the Legislature in a case like the present to force the owner of the soil into the position of a claimholder, that intention was not carried out by the words of the Act. [SOLOMON, J.: Supposing Goldschmidt



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had been merely a claimholder without any agreement to take a lease?] Then his rights would determine on non-payment of licence-money. [LAURENCE, J.P., referred to *L. & S. A. Exploration Company vs. Murphy*, 4 H. C. 322, and 5 S. C. 259.] At common law non-payment of rent for two years would entail a forfeiture.

*Hopley, C. P.* (with him *Lange*), for the defendants, said that the board justified the registration of the claims in their name under sect. 78 of Act 19, 1883, on receipt of the notice of abandonment by the claimholder under sect. 65. It was admitted that Goldschmidt was a claimholder until August, 1885, and the board could only go by the register, and knew nothing of any private arrangements between claimholders and the plaintiffs. In this case the only act of abandonment was the letter of September, 1887, which must be taken to relate back to the period when the claimholder's rights terminated. Until such notice was given the claimholder was liable for mining board rates and the performance of other duties imposed by law on claimholders. The words "claimholder" and "owner of claims" appeared to be used indiscriminately and synonymously in the Act and clearly did not refer to the owner of the soil. The words "registered and rightful owner" merely meant the claimholder who had been registered as of right and not tortiously, and who remained on the register as such. As the plaintiff company denied that they ever held any claims as such, the board were entitled to regard the registered claimholder as the rightful owner till he gave notice of abandonment. If Mr. Goldschmidt had sent his notice two years before the plaintiffs could not have excepted to its validity and there was nothing in the mere lapse of time to debar him from doing so. He referred to the case of *Griqualand West D. M. Co. vs. L. & S. A. Exploration Co.*, 1 A. C. 239, the decision in which case he suggested had led to the present enactment being framed, and argued that if these claims were valuable the plaintiff company should have taken them over and if they were worthless they had no grievance. He also referred to *L. & S. A. Exploration Co. vs. Dutoitspan Mining Board*, 2 H. C. 151; *L. & S. A. Exploration Co. vs. French & D'Esterre D. M. Co.*, *ibid.* 512; *L. & S. A. Exploration Co.*



vs. *Dutoitspan Mining Board*, *ibid.* 569; *L. & S. A. Exploration Co. vs. Murphy*, *ubi supra*.

*Leonard*, Q.C., in reply, referred to the judgment of the CHIEF JUSTICE in *Griqualand West Co. vs. Exploration Co.*, 1 A. C. at p. 264, and argued that if the Legislature had intended claims to be dealt with by the Mining Board as in the present case, that intention had not been expressed by apt words, and the enactment was void for uncertainty. The tenure must be regarded from the point of view of the ordinary relation between landlord and tenant, and, Goldschmidt having no right whatever at the time he professed to abandon, his action in the matter was entirely inoperative.

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*Cur. adv. vult.*

*Postea* (June 15),—

LAURENCE, J.P., said :—In this case the plaintiff company, owners of the farm Bultfontein, on which the Bultfontein Mine is situated, claim an order for the cancellation of the registration of certain seven claims in the Bultfontein Mine in the name of the defendant board, and that the board be ordered to quit and deliver up to the plaintiffs the possession of the said claims, and pay them the sum of £31 10s. as damages. The defendants admit that the claims in question were registered in their name in December last, as alleged by the plaintiffs, and that they are still in possession of them, but plead that such possession is of right. They allege that in September, 1887, the claims became legally abandoned, and that the plaintiffs having, as is admittedly the case, declined to take upon themselves the liabilities of an ordinary claimholder in respect thereof, as provided by Act 19 of 1883, sect. 78, the said claims thereupon became the property of the defendant board, and it procured their registration into its own name, as it was legally entitled to do. The only question therefore is as to the lawfulness or otherwise of the action of the defendant board in procuring the registration and maintaining the possession of these claims. That the property in question is claim property is

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really common cause, and it is so expressly described in the plaintiff's declaration, and there is no prayer by the plaintiffs, as in *Murphy's Case*, to be presently referred to, to declare, in terms of sect. 81 of the Act of 1883, that this property or portion of ground is no longer "assigned for mining purposes;" neither is there any application, such as I understand was made to the Supreme Court in *Pullinger's Case*, for the removal of the claims from the register of the mine. The property therefore consists of claims, and it also, as pleaded by the defendants, consists of claims in a "duly proclaimed mine." We were referred during the trial to the proclamation by which Bultfontein was declared a mine; and although the manager of the plaintiff company apparently does not admit the validity of such proclamation, it appears to be within the authority conferred on the Executive by sects. 17, 76 and 79 of the Act of 1883, and in a matter of this kind, and in the absence of any evidence to the contrary, the Court will certainly presume *omnia rite esse acta*. Now the defendant board assert that these claims have been legally abandoned in terms of sects. 65, 66 and 78 of the Act of 1883. The definition of abandoned claims is given in sect. 65, and is as follows: "From and after the promulgation of this Act a claim in any mine shall be considered as abandoned whenever the same shall have been abandoned in accordance with any rule, regulation, ordinance, or law heretofore in force, or when the registered and rightful owner of the same shall give notice in writing to the inspector, or if held under the provisions of Griqualand West Ordinance No. 6 of 1880, to the registrar of deeds, of his intention to abandon the same." Then sect. 66 provides *inter alia* that "any claim legally abandoned"—that is coming within the definition of abandonment laid down in the preceding section—"shall be the property of the mining board, body, or officer for the time being representing the claimholders at the mine where such abandoned claim is situate, and such board, body, or officer shall, saving all lawful demands of any creditor holding a lien against such claim, and subject to the provisions of the last preceding section, be entitled to hold, dispose of, or otherwise deal with the same, as he or they may deem expedient for the benefit of the mine generally," &c. Then we

come to sect. 78, upon which the defendants rely in their plea, and which is as follows: "Every abandoned claim in any mine, situate upon land the title to which is not subject to any reservation of minerals or precious stones in favour of the Crown, shall become the property of the mining board, body or officer mentioned in the 66th section of this Act, under and by virtue of the provisions of the said section, unless the owner of such land shall, within thirty days after he shall have received written notice from any officer duly appointed in that behalf of the fact that such claim has been abandoned, signify to such officer in writing his willingness to take upon himself all the liabilities and responsibilities of an ordinary claimholder in respect of such claim. In the event of his so signifying his willingness as aforesaid, he shall thereupon become and be subject to all the laws, rules, and regulations applicable to other claimholders in such mine in respect of such claim." It being admitted that the plaintiff company have declined to avail themselves of the option thus conferred on them, the only question for the decision of the Court is whether these claims have been legally abandoned within the definition of abandonment given in sect. 65 of the Act as quoted above. It is admitted that they have not "been abandoned in accordance with any rule, regulation, ordinance or law heretofore in force;" does then the case fall within the alternative provision "or when the registered and rightful owner of the same shall give notice in writing to the inspector of his intention to abandon the same?" Now, as to the words "owner of the claim" in this section, there can be no doubt that they are used as equivalent to "claimholder," and must be distinguished from such expressions as "owner of the soil" (sect. 35), which in the case of Bultfontein refer to the plaintiff company. The defendant board say that the registered and rightful owner has in the present case given the inspector the statutory notice of his intention to abandon, that until this notice was given there was no legal abandonment, and that by it the abandonment was legally completed. The notice upon which they rely consists in a letter addressed to the inspector by Mr. A. Goldschmidt, and dated September 26, 1887, and which is in the following terms: "My attention has been

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directed by the Registrar of Mines to the necessity of giving you notice in writing of the abandonment of claims in Bultfontein registered in my name. I regret that this was not done in 1885, I thought then it was sufficient to notify the fact to the owners. I now beg leave to inform you that I . . . have abandoned the following claims . . . as from 31st August, 1885." In a subsequent letter, dated Sept. 27, Mr. Goldschmidt gives the numbers of the claims in question. Now at the date in question Mr. Goldschmidt was undoubtedly the registered owner of these claims, and although he might on August 31, 1885, or at any other time, have *de facto* abandoned them, there was in my opinion no abandonment *de iure* until he signified the fact to the inspector as provided by the section. The contention for the plaintiff company is in effect that in consequence of the *de facto* abandonment which had previously taken place, Mr. Goldschmidt in September, 1887, although the registered was not the rightful owner, that he had ceased to have any right and title to the claims in question, and that therefore the notice contained in his letter to the inspector was entirely inoperative and void and consequently did not vest in the defendant board the rights and powers conferred by sects. 66 and 78. Now I think that there was considerable force in the defendant's contention that the employment of the word "rightful," in addition to the word "registered," must not be pressed too far; that it is very like the common expression "true and lawful owner," in which the latter adjective if not merely cumulative is merely, as the grammarians would say, epexegetic, and that the meaning of the word "rightful" in this connection is practically equivalent to "non-tortious," and that it simply means that the claimholder must have been registered as such, not tortiously, but as of right, and that such is the present case. The plaintiffs, however, contend that Mr. Goldschmidt, although his name had not been removed from the register, had really at this time no rights whatever as a claimholder; and in order to deal with this contention it seems necessary to carefully examine the legal position of claimholders in mines such as Bultfontein. Now while fixity of tenure in the case of claimholders in mines on Crown lands and on private



properties in which the precious stones and minerals belong to the Crown has been expressly granted by Ordinance 6 of 1880, in the case of mines like Bultfontein and Dutoitspan, and irrespective of such special agreements as the claimholders may have made from time to time with the proprietors of the mine, such fixity of tenure, so long as the conditions of occupation are complied with, seems rather to be assumed or implied than explicitly laid down in any of the enactments relating to the subject. Under the original Proclamation of Sir H. Barkly, 71 of 1871, which was made applicable to private property by sect. 29, provision was made, by sect. 10, for the forfeiture by claimholders of their title upon the register of claims by non-payment of licence-money; and it might fairly be argued that these provisions with regard to forfeiture implied that as long as the claimholder discharged his obligations he was not liable to eviction, and no attempt, so far as I am aware, has ever been made to treat claimholders as having no greater rights than mere monthly tenants—than standholders, for example, under the former state of the law—or to deal with their right of occupation as merely precarious. It was argued by Mr. *Leonard* in the case of *Griqualand West D. M. Co. vs. L. & S. A. Exploration Co.*, 1 A. C. 239, that “a right of servitude seemed the closest analogy to the right of the claimholders” (p. 251)—that they have so to speak a *ius fodiendi*—and the same argument was employed in the present case. In the case just referred to the CHIEF JUSTICE observed that the proprietors, the then appellants and present plaintiffs, “promised, by giving out those licences, that those who dug for diamonds in their claims should not be disturbed by the owners in the course of doing so” (p. 264). In the case of *L. & S. A. Exploration Co. vs. Murphy* it was held by this Court that the forfeiture clause of the Proclamation of 1871 did not operate so as to release a claimholder from his liabilities as such in the event of his rent falling into arrear; and my observations on that point in giving the judgment of the Court were quoted with approval by the CHIEF JUSTICE on appeal (4 H. C. at pp. 330, 331; 5 Juta, S. C. 264, 265). Now *Murphy’s* case depended to a great extent on the construction of the Proclamation of 1871 and it was held that his liabilities as a claimholder

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determined on his receiving official notice of forfeiture under that Proclamation early in 1883 and before the Act of that year, repealing the Proclamation in question, was passed. Mr. Goldschmidt, as was expressly admitted, was a claimholder in Bultfontein under the old Proclamation in and before 1880; but since 1883 his rights and liabilities became regulated by the Act of that year, which with the exception of certain portions is made expressly applicable to mines like Bultfontein by sect. 79. Under that Act (sects. 20-25) a claimholder is entitled to a certificate of registration and his right to mortgage or transfer his claims is expressly recognised in terms which clearly imply a permanent right of user, whether it be described as a servitude or anything else. Previous to 1880 the claimholder in Bultfontein had paid licence-money at the rate of 10s. 6d. per claim per month to the Government officer, who after retaining a certain percentage of this for "good government," as provided by the local law (see Proclamation 71 of 1871, sect. 29; Ordinance 17 of 1880, G. W.), handed over the balance to the owners of the soil. In 1880 an arrangement was made with the Bultfontein claimholders, including Mr. Goldschmidt, that for the future they should pay 30s. per month, *i.e.*, 10s. for each claim and 20s. for one acre of depositing ground annexed thereto; and this arrangement was confirmed by the provisions of sect. 35 of the Act of 1883. According to the evidence of the registrar the present practice is for this payment to be made direct by the claimholders to the proprietors, who then pay over to the Government the percentage agreed upon as provided by sect. 77 of the same Act. Subject to these payments and the due discharge of their other legal obligations the claimholders would seem, for the reasons given above, to enjoy practical fixity of tenure; and in the case of the Bultfontein claimholders, including Mr. Goldschmidt, this was expressly provided for in 1880 by the agreement to lease of which a copy was put in and which provided for the granting by the proprietors to the diggers on the conditions therein set forth of quinquennial leases renewable in perpetuity. Mr. Goldschmidt agreed to take one of these leases, and the result of this arrangement was at all events not to make his position any worse or his tenure any less certain than if he

had remained the holder of a monthly licence as before. After entering into this agreement Mr. Goldschmidt did not actually take out a lease, but he paid the agreed rental for these claims up to May, 1883. In 1884 he informed the manager of the plaintiff company that he could no longer pay the rent and, the period for which these leases were granted having expired in August, 1885, he was under the impression that his interest in the claims had then determined, but sent the subsequent notice of abandonment on being informed that until he did so he would be held liable for the payment of mining board rates and the discharge of the other liabilities of a claimholder. Now, with regard to Mr. Goldschmidt's arrangements with the plaintiff company, his conversation with Mr. Currey in 1884, and his non-renewal of his lease agreement in 1885, it is of course to be observed that these matters were *res inter alios actæ* and do not in themselves in any way bind the defendant board. That the non-payment of rent does not in itself discharge a claimholder from his obligations was decided, as already remarked, in *Murphy's* case; and it may probably be assumed that the plaintiff company would at any time have been willing to allow Mr. Goldschmidt to pay up his arrears and resume his occupation of the claims. Meanwhile his name remained on the register and until he gave the statutory notice he cannot be held to have legally abandoned these claims. It is difficult to see what legal defence he would have had if he had been sued by the board for rates levied in respect thereof, or if a neighbouring claimholder had sued him for any damage which might have been sustained in consequence of his neglect to work the claims. So long as Mr. Goldschmidt omitted to abandon these claims and the plaintiffs allowed them to remain on the register, instead of applying, as they might have done, for such an order as was granted in *Pullinger's* case, the defendant board was, in my opinion, entitled to regard him as "the registered and rightful claimholder," and to accept and act on the notice given by him in that capacity, which was in fact an *ex post facto* notice of his intention to abandon from September, 1885, though presumably it would not have the effect of relieving him from liability for any rates which might in the meantime

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have accrued due (*cf. Craven, N. O., vs. Robinson & Co., 4 H. C. 119*). It is clear that if Mr. Goldschmidt had given this notice at an earlier date it would have been a valid notice; and I cannot hold that mere delay on the part of the claimholder in giving the notice under the Act is in itself sufficient to deprive the defendants of their statutory rights or to absolve the plaintiffs from their statutory liabilities. On the whole it appears to me that the construction I have indicated is the only reasonable construction which can be placed on the terms of sect. 65 of Act 19 of 1883, and that if this case were held not to fall within those words the result would be to render the provisions of the Act on this subject practically abortive. The question of the rights and liabilities of the owners of the soil in relation to the claimholders in mines like Dutoitspan and Bultfontein was first raised in January, 1883, in the argument on appeal in the case, already referred to, of *Exploration Co. vs. Griqualand West D. M. Co.* The question was then first raised whether the owners of the soil could be held equally liable with ordinary claimholders for the dangerous condition of claim property which might happen not to be registered in the name of any claimholder and thus to be vested in the owners; and the Court of Appeal by its judgment of absolution from the instance expressly refrained from deciding that question, not indeed without giving some indications of opinion, but not considering that the case was brought before the Court in such a form as to render it advisable to pronounce a final decision. Then shortly afterwards this Act was passed, which provided in effect that in the case of abandoned claims, unless the owners of the soil were willing, to use the expression of the CHIEF JUSTICE in the above case, "to take upon themselves the duties and liabilities of miners," the mining board should have the right to take over such claims and hold them and deal with them as might seem best for the interest of the general body of claimholders. It is said that this enactment constitutes a great infringement on private rights and must therefore be construed with great strictness. The Court must no doubt be careful not to go beyond what has been enacted, but on the other hand it is not the business of the Court to be

“astute to find reasons” for not giving effect to the clear intention of the Legislature. It may indeed be suggested that this enactment does not really lay any very grievous burden upon the plaintiffs or place them in any intolerable dilemma; for if the claims are valuable there is no very great hardship in the peculiar circumstances of the case in their being called upon to take them over, if at all, *cum onere*; while if they are worthless the plaintiffs in the long run will probably rather gain than lose by the mining board taking them over in the interest and for the protection of claimholders; since if left unprotected they may become so dangerous as to involve the abandonment of other claims in their vicinity and a consequent diminution in the rental of the mine. If we decided this case in favour of the plaintiffs’ contention, the result would be that they would acquire possession of these claims without any attendant liability, a result which it is clear was not contemplated by the Legislature. The question of the construction to be given to these provisions is now really for the first time before the Court; for of the three cases referred to by counsel, one—that of the *Exploration Co. vs. Dutoitspan Mining Board*, 2 H. C. 154—was decided on the ground that the board had failed to prove that notice to the plaintiff company, under sect. 78, had been duly given by the proper officer, while in the other two cases the Court simply held that the matters in issue between the parties could not be satisfactorily determined on motion. Now that issue has been fairly joined, it is argued that the Legislature has failed to signify its intention in apt words and that the enactment is therefore void for uncertainty. This is language more frequently employed with regard to a testamentary instrument than in the case of a statute; but in both cases the principle of interpretation and construction I take to be substantially the same and the Court, looking at the document as a whole, must do its best to ascertain and give effect to the intentions of its author. There is however this difference that while, if a mistake is made in the case of a testamentary disposition, it is beyond repair, if we err in interpreting the meaning of the Legislature, the Legislature can set us right. On the whole I am of opinion that the present case comes within

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the statutory provisions on which the defendants rely, that they have justified their possession and are therefore entitled to the judgment of the Court.

SOLOMON, J., after referring to the pleadings, said:—The facts of the case are shortly as follows:—In the year 1880 one Anthony Goldschmidt was the registered holder or owner of the claims in question. For some time previous to 1880 there had been disputes between the claimholders and the proprietors of the mine regarding the amount of licence-money to be paid by claimholders. In that year an agreement was come to whereby the claimholders undertook in future to take out leases of their claims for the term of five years at a monthly rental of 30s. per claim, in return for certain rights and privileges to be conferred upon them by the proprietors. Notarial copies of the form of lease and of the articles of agreement conferring these rights and privileges were put in at the trial. Amongst other claimholders Goldschmidt bound himself in writing to accept the foregoing lease. For some reason or other, however, he never actually took out a written lease of his claims, though it is clear from the evidence both of Mr. Currey and of Mr. Goldschmidt himself that both parties considered themselves thenceforth bound by the terms of this lease. This is also evidenced by the fact that from that date Goldschmidt commenced to pay 30s. per month for his claims, as provided for by the lease, instead of 10s. 6*d.* as theretofore, and that the proprietors granted him the rights and privileges in connection with his claims set forth in the articles of agreement already referred to. Under these circumstances I think the plaintiffs' counsel was justified in saying that Goldschmidt became a lessee of the plaintiffs under this lease just as much as if he had actually taken out a written lease of the claims. Goldschmidt thereafter continued to work the claims and to pay his monthly rent or licence-money up to May, 1883, but he has paid nothing since that date. In August, 1885, his five years lease expired; he did not renew it as he was entitled to do under the lease, and he says that he never intended to renew, and considered that after August, 1885, he had no further interest in the claims. But though he



ceased to occupy the claims and to pay licence-money, his name remained on the register of claimholders, and no steps were taken either by the plaintiffs or by himself to have his name removed from that register, though it appears that at the request of the manager of the plaintiff company the Registrar of Mines made an entry in his register against these claims to this effect: "Lease not renewed 31st August, 1885." From that date the claims remained unworked, and nothing further seems to have been done in connection with them until June 16, 1887, when the secretary of the Mining Board sent a notice to the plaintiff company calling their attention to the fact that the claims in question, described as the property of the plaintiff company, were dangerous. A subsequent notice was sent on June 29, 1887, to a similar effect. These notices, however, were subsequently withdrawn by letter of August 4, 1887, in which the secretary of the Mining Board explained that they had been written under the mistaken supposition that the claims in question were abandoned ground. Thereafter, at the request of the secretary of the Board, Goldschmidt wrote a letter dated September, 1887, in which he formally gave notice to the inspector that he had abandoned these claims as from August 31, 1885. Notice of this fact was thereupon sent to the plaintiff company, who did not within thirty days signify their willingness to take upon themselves the responsibilities and liabilities of ordinary claimholders; and the Mining Board accordingly claim that under the provisions of sect. 78 of Act 19 of 1883 these claims have become their property. From this short statement of the facts it is apparent that the only question which has to be decided is whether in September, 1887, these became abandoned claims in a duly proclaimed mine. The question apparently is a very simple one of fact, but its determination will be found to involve the consideration of important questions regarding the relative rights of claimholders in a mine and of the owner of the soil upon which the mine is situated. Now in the first place I do not think that there can be any question that the Bultfontein mine is a duly proclaimed and defined mine within the meaning of Act 19 of 1883, and that the provisions of Division IV. of

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the Act are therefore applicable to this mine. It is true that during the argument some doubt was thrown upon this point by the plaintiffs' counsel, but it was not really seriously contested, and, in the face of the Proclamation and Government notice referred to at the trial, I do not see how there can be any difficulty about this. In the second place I am satisfied that the property in question was in September, 1887, claim property in the Bultfontein mine. It was argued on behalf of the plaintiffs that the claims in question had ceased to be claims in August, 1885, that they had been removed from the mine at that date by the plaintiff company, and that this ground thenceforth was no longer assigned for mining purposes. Now there is the very simple answer to this contention that on the plaintiffs' own declaration the property is described and treated as claim property, and that they cannot now go behind that admission. The explanation given by the plaintiffs' counsel of this fact is that it was impossible to describe the property in any other way if the declaration was to be made intelligible, that it was not intended to operate as an admission and that it ought not to be treated as such. Whether this explanation disposes of the difficulty I am not concerned to consider, for in the view which I take of the case I do not find it necessary to tie down the plaintiffs too strictly to this admission, inasmuch as I am satisfied apart altogether from such admission that these were claims in September, 1887. It is clear that in August, 1885, they were claims in the mine as proclaimed and defined under the Act; but it is said that they have been removed from the mine and that they no longer appear as claims in the plans of the mine issued by the plaintiff company. Now it so happens that the ground in question in this case was on the boundary of the mine, so that it was an easy matter by merely altering the boundary line of the mine to change the plans in such a way as to include these claims; but if the plaintiff company's contention is correct that under such circumstances as these they have the power to remove claims from a duly defined mine, then it is clear that this power might be exercised in respect of claims situated in the very centre of the mine, with this result that there would be an isolated block of ground in the middle of the mine not form-

ing portion of the mine itself. The contention certainly is a novel one, but in my opinion it cannot be sustained. Under sect. 76 of Act 19 of 1883, mines upon private property where there is no reservation of precious stones in favour of the Crown may be proclaimed and defined in like manner as if the same were situate on Crown lands. Now in the case of Crown lands, under sect. 18 the Governor has the power to declare a mine and to describe the area thereof in the first instance; and under sect. 34 the Commissioner is authorised to have a survey made of the mine and the mining area and to frame a plan of the said survey, which is to be deposited in the office of the Civil Commissioner of the district. The area so surveyed may from time to time be altered and enlarged at the discretion of the Commissioner. The power, therefore, of altering the boundaries of the mine is conferred by law upon the Commissioner; but I cannot find that the owner of the soil, who has once given out claims and assigned a certain portion of his ground for mining purposes, has the power, after the mine has been duly proclaimed and defined, to withdraw any claims therefrom, and so to alter the limits of the mine. In fact it appears to me, upon a consideration not only of these particular provisions but of the whole scope both of this Act 19 of 1883, and also of the previous statutes upon the subject, that it was the deliberate intention of the Legislature, in legislating upon the subject of precious stones and minerals, to curtail very considerably the common law rights of the owner of the soil over ground which had once been proclaimed a mine, and amongst other things to deprive the owner, except under special circumstances, of the right of resuming such ground for his own use. For instance, under Griqualand West Proclamation 71 of 1871, which is the first statute dealing with this subject, and which continued to be in force in such mines as Bultfontein up to the passing of Act 19 of 1883, provision is made for the forfeiture of a claimholder's rights over his claim, if he is in arrear with his licence-money for seven days, under sect. 10, or if he shall leave his claim unworked for eight days, under sect. 16. But in case of such forfeiture the claim does not thereupon, as would of course be the case under the common law, revert to the owner of

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the soil to deal with as he pleases. Under sect. 11 the inspector of mines has the right to grant such claim to any person applying, and paying licence for it, and in case there is more than one application the claim must be put up to public competition. The result is that valuable claims which had become forfeited could never possibly revert to the owner of the soil, as there would necessarily be one or more persons ready to apply for such claims. The Legislature, however, did not apparently contemplate the possibility of claim property being so onerous as to be unremunerative, and accordingly no provision was then made for the case where no application was made for such forfeited claims, and in the absence of such provision the property in such claims it is presumed would revert to the owner of the soil. This continued to be the position of affairs in the Bultfontein mine up to the passing of Act 19 of 1883. In that year the cases of the *Griqualand West D. M. Co. vs. L. & S. A. Exploration Co.* were heard, and I believe they had an important bearing upon the subsequent legislation on the subject. These cases raised the question of the rights and liabilities of the owner of the soil in respect to claim property which had been abandoned and which had reverted to him. In the Court of Appeal no definite decision was given upon this point, for reasons which it is not necessary to specify, but there was a very strong expression of opinion from the Court that in such a case the ordinary liabilities affecting claimholders in a mine did not attach to the owner of the soil in respect of such claims. This expression of opinion was of the utmost importance to claimholders in a mine and to the mining boards, inasmuch as it was most essential to these parties that all the claims in the mine should be owned by responsible persons subject to all the liabilities and responsibilities of ordinary claimholders; and I don't think that I am wrong in saying that the new and peculiar provisions regarding abandoned claims, which are contained in Act 19 of 1883, were the outcome of these cases. That Act provides that, in mines such as Bultfontein, abandoned claims (and I may here observe that the forfeiture of claims is abolished by this Act) shall become the property of the mining board unless the owner



of the soil is prepared to take upon himself the liabilities and responsibilities of ordinary claimholders. These provisions supply the omission which there was in Proclamation 71 of 1871; and the result now is that if valuable claim property is abandoned by a claimholder, the probability is that the owners of the soil would be willing to take over the claims as claimholders, while if the claims are of no value the claims would become the property of the mining board; but in neither case do the claims cease to be claims as heretofore. The intention of the Legislature I think there can be no doubt was that ground once assigned for mining purposes should continue to be claim property so long as it remained within the defined limits of the mine, and that there should always be some person responsible as claimholder for these claims. If that be so then clearly the claims in question which were claims in August, 1885, and which are within the defined limits of the mine, were still claims in September, 1887. But it is said that if that was the intention of the Legislature they have failed to express their intention clearly, by reason of their definition of abandoned claims; and it is argued that the claims in question in the present case did not in September, 1887, become legally abandoned in terms of sect. 65 of the Act 19 of 1883. Now, under that section a claim in a mine is abandoned when it shall have been abandoned in accordance with any rule, regulation, ordinance or law heretofore in force, or when the registered and rightful owner of the same shall give notice in writing to the inspector of his intention to abandon the same. The defendant's case is that the claims became abandoned when Goldschmidt gave notice in September, 1887, of his intention to abandon them, and that being so it is unnecessary for me to refer to the previous portion of the section. The plaintiffs' argument on this point is shortly this, that Goldschmidt's rights in respect of these claims absolutely ceased in August, 1885; that consequently he had nothing to abandon in September, 1887; that after August, 1885, though he was registered as owner he certainly was not the rightful owner of the claims; that the plaintiffs are not bound by the register; that the claims consequently were not abandoned in terms of sect. 65; but that in August, 1885,

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they had reverted to the owner of the soil. The argument certainly is, on the face of it, a plausible one, but upon examination it fails in my opinion, simply because it appears to me to regard the claimholder as a mere lessee for a fixed term under the owner of the soil with the common law rights and liabilities attaching to such a position, and it loses sight altogether of the special rights which have been conferred by the Legislature upon a registered claimholder in a mine. At the risk of being tedious it becomes necessary for me therefore shortly to refer to the legislation upon the subject, but before doing so I would merely point out that the position now taken up by the plaintiff company is the very opposite of the position which they took up in the case of the *L. & S. A. Exploration Co. vs. French & D'Esterre D. M. Co.*, 2 H. C. p. 542. In that case the French and D'Esterre Company had leased certain claims from the plaintiff company, under a lease commencing on 20th November, 1883, to expire on the 31st August, 1885. Shortly afterwards, under the provisions of sect. 65, they sent a notice to the Inspector of Mines of their intention to abandon these claims. The Exploration Company, however, disputed their right to abandon the claims during the currency of the lease. In the present case, however, the same company contends that the claims can only be abandoned while the lease is running, and when the lease is once at an end no abandonment can take place. However, passing by the inconsistency of these two arguments, let me consider shortly what is the position of a registered claimholder in a mine. Now this is a question which has been often discussed, but upon which no definite decision has been given, nor do the statutes on the subject anywhere clearly set forth the exact position. It has been argued in some cases that a claimholder, paying his monthly licence-money, is merely a lessee from month to month, and in other cases it has been argued that he is the owner of a servitude or right to dig. Now, whatever may be the correct legal terms to apply to the relative positions of owner of a claim and owner of the soil, one thing, at least, appears to me to be quite clear, and that is that all the statutes, from the earliest to the latest, recognise that one of the rights enjoyed by a claimholder is fixity of tenure. This right of

fixity of tenure is to be inferred from the various provisions of Proclamation 71 of 1871, more particularly the sections regarding forfeiture to which I have already referred, and the general conclusion which I draw from these provisions is that a claimholder was not liable to be dispossessed of his claim at the mere will of the owner of the soil, but that he was entitled to continue to search for diamonds for an indefinite period unless he had become disentitled under the provisions of either sect. 10 or sect. 17. By the subsequent statutes, Ordinance 10 of 1874 and Proclamation 8 of 1880, which, however, are only to a limited extent applicable to Bultfontein, the position of a claimholder as regards his tenure was still further improved. In Ordinance 10 of 1874 the provisions for forfeiture set forth in Proclamation 71 of 1871 do not again appear, but in place thereof it is provided in sect. 5, sub-sect. 6, that a claim in which the inspector may order particular work to be done, and in which such work shall not be begun or faithfully continued for seven days, shall be declared abandoned. And again in Proclamation 8 of 1880 his position is still further improved, as in that statute all forfeiture is done away with, and instead thereof it is provided that a claim in any mine shall be considered abandoned when the registered and rightful owner of the same shall give notice in writing to the inspector of his intention to abandon the same. This same provision is repeated in Act 19 of 1883, with this addition, that a claim shall be considered abandoned also when it shall have been abandoned in accordance with any rule, regulation, ordinance or law heretofore in force. The position then appears to be this, that a person who has once become a claimholder in a mine continues to be such, in the absence, of course, of transfer, until he of his own accord abandons his claims in the manner provided by the Act, or until they become abandoned in accordance with the provisions of some previous statute. And it is of the greatest importance to observe that all these provisions apply only to registered claimholders, and that registration is essential to the enjoyment of the rights of a claimholder. It was argued on behalf of the plaintiff company that they had nothing to do with the register and that they were not in any way bound by it.

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But a reference to all the statutes will shew that this position is quite untenable, and that the register of claims with respect to claim property is as binding and as of much importance as the register of deeds is with respect to immovable property generally. Proclamation 71 of 1871 at the very commencement provides for the keeping of the register by the Inspector of Claims, whose duty it is, amongst other things, to register with the number of each claim the name of the person or persons entitled to search for diamonds therein, and to register every purchase or transfer of every claim without which no transfer shall be allowed to be valid. Then it is provided that no person shall be entitled to work any claim unless he shall have been duly registered by the inspector as entitled thereto. Nothing surely can be stronger than these provisions. No matter what rights, whether under a lease or otherwise, the claimholder may have contracted for from the owner of the soil, he is not entitled to work the claims and is in fact not the real owner of the claims, until he is registered by the inspector; and after such registration he cannot transfer his rights and liabilities to another except by procuring such transfer to be made in the register of claims. So again, when a claim is forfeited under sect. 10, the inspector cancels the title of the defaulting claimholder, and he enters in the register the name of the new claimholder to whom the claim may be granted. Surely if these various sections mean anything they mean that the person whose name is registered as the owner of the claims is in the eye of the law the only person who is entitled to work them, and is the true and rightful owner of the claims. Similar provisions as regards registration are made in the subsequent statutes, Ordinance 10, 1874, and Proclamation 8, 1880, though it is not necessary to refer in any detail to these provisions. It is sufficient to observe that the system of registration inaugurated by Proclamation 71 of 1871 was continued and extended by these later statutes, in which further provision is made for the appointment of a special officer, to be called the Registrar of Claims, for the hypothecating of claims and for the registration of such hypothecations. Finally, in the consolidating Act, 19 of 1883, the system of registration is again adopted and en-

forced. So that ever since the opening of the Diamond Fields in 1871 up to the present time the registration of claims has been an essential portion of the legislation upon the subject of precious stones and minerals, and these provisions regarding registration are of the greatest importance not only to the claimholder himself, but also to the mining board, which has the power of imposing rates upon all claims in the mine, and to the adjoining claimholders, who are entitled amongst other things to hold the claimholder responsible for any injury occasioned by his neglecting to work down his claim properly. In case any injury is occasioned to an adjoining claimholder by such negligence, or in case rates are imposed by the mining board upon claims in the mine, the persons who are responsible in each case are the registered claimholders. And so also for all other purposes it appears to me that the person whose name appears in the register as the owner of a claim is to be considered not only the registered but also the rightful owner of such claim. Applying then these principles to the facts of the present case, we have it that from 1880 to 1885 Goldschmidt was not only the registered but admittedly the rightful owner of these claims. In 1885 his lease expired and he says that he thought that thereupon his rights over the claims ceased *ipso facto*, and that the claims had been abandoned. And the plaintiffs take up the same position. Now this would be all very well if Goldschmidt had been merely a lessee for five years; but in addition to that he was also a registered claimholder and he continued to be such after August, 1885. As lessee his rights ceased when his lease came to an end, and in that capacity he had nothing to abandon; but as registered claimholder his rights and liabilities continued so long as he did not abandon his claims in the manner provided by the law, and so long as he allowed his name to remain on the register. Goldschmidt did not in August, 1885, when he says he abandoned his claims, follow the course prescribed by the Legislature, and accordingly neither the expiry of his lease under the plaintiff company, nor any private agreement come to between them, can be of any avail except perhaps as between the immediate parties thereto. Neither Goldschmidt therefore nor the

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plaintiff company, who might have taken the proper steps for the removal of his name from the register, can now be heard to say that, though he was on the register, he was not the rightful owner of the claims. And here I might shortly refer to the case of the *L. & S. A. Exploration Co. vs. Murphy*, 4 H. C., p. 322, and 5 S. C. 259, to shew what importance is attached to the register of claims. In that case a claimholder, who had ceased to pay licence-money on certain claims since November, 1880, and who had also given up all actual or physical occupation of his claims, was held liable for licence-money up to January, 1883, the date when his name was cancelled on the register, the ground of the decision being that while his name appeared on the register he was in legal though not in physical occupation of the claims. So in the present case Goldschmidt's name having remained on the register up to September, 1887, he was at that period the registered and rightful owner of the claims, entitled to exercise the rights and subject to all the liabilities of owner. Consequently I am of opinion that these claims were legally abandoned by the notice which was given by Goldschmidt in September, 1887. That being so the claims have, under sect. 78, become the property of the Bultfontein Mining Board, and the defendant is therefore in my opinion entitled to the judgment of the Court.

COLE, J.:—When I first looked over the pleadings in this case I imagined that the only question between the parties to the suit was whether the defendant board had been premature or not in taking possession of certain claims and having them registered in their own name. But at the hearing of the case it appeared that a much broader question was in issue—namely, whether the defendant board had a right at any time to the claims, and whether the previous holder of them had anything to abandon within the meaning of sect. 78 of Act 19 of 1883. The contention of the plaintiff's counsel was that Goldschmidt was simply the tenant of the plaintiff company who were the owners of the soil; that he stood in precisely the same relation towards the company as any other tenant towards his landlord; and that when his lease, or agreement for lease, expired in August,



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1885, and neither party sought to renew it, his tenancy, *ipso facto*, ceased, and that he had nothing to abandon. Now, if this were so there would be no question of the plaintiffs' right to succeed in this action. But we cannot shut our eyes to the special legislation which has from time to time been made in regard to claims in mining areas. The Ordinance 10 of 1874 makes it incumbent on "the inspector, or overseer under him, at any digging to register all the claims at such digging in the names of the persons to whom they may be allotted or transferred, and also to register all abandonments, re-allotments, transfers, &c." That Goldschmidt's claims, which are the subject of this action, were thus registered was known, though we have no evidence as to whether he himself procured the registration, nor do we know whether he held the certificate of registration to which he was entitled under the same Ordinance. At first I was inclined to think that unless it were proved that Goldschmidt had got his name put upon the register himself, it was not incumbent on him to have it removed when he ceased to be tenant of the claims. But on further reflection I have come to the conclusion that until his name was removed he would have been liable to such rates as the Mining Board might be entitled to levy, just as the registered owner of land who has sold it, but has not passed transfer to another, remains liable for divisional council rates. Being on the register he was the ostensible holder of the claims, and his title ostensibly good against any other claimant. It is true that as between himself and the plaintiff company his verbal relinquishment of his lease in August, 1885, freed him from further liability for rent; but it did not release him from rights which third parties might have against him as the still ostensible holder of the claims. To do this it was necessary that he should formally abandon them, and the Legislature has indicated how this should be done and what consequences were to follow. It was not till September, 1887—two years after his tenancy had ceased—that Goldschmidt pursued the course he ought to have taken in August, 1885, and gave formal notice of abandonment. I have no doubt that the defendant Board induced him to do this in furtherance of their own object, which was to get the claims for themselves,

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but as they were acting quite within their legal rights in so doing there is no necessity to comment on the action they took. The notice required by sect. 78 of the Act of 1883 was duly given to the plaintiff company; but Mr. Currey took up the same attitude in regard to it as he did in the witness-box and treated it as something that did not concern his company at all and ignored the Board's rights in the matter altogether. In this I think he was mistaken. It is true that Goldschmidt sought to antedate his abandonment by saying that it was made in 1885: in one sense he was right, but in the legal sense he was wrong. His abandonment—the abandonment contemplated by the law—was only complete from the date of his letter. And this disposes of Mr. *Leonard's* argument that inasmuch as the defendants' pleadings claim an abandonment in September, 1887, and Goldschmidt's letter on which the defendants rely for evidence professes it to have been in 1885, therefore the defendants were out of Court. Regarding as I do the legal abandonment to have been in September, 1887, and the attempt to antedate it futile, I think the defendants' contention is a good one, and that at the expiration of the thirty days after their notice, as fixed by the statute, they had a right to take possession, and become registered holders, of the claims in dispute.

Judgment was therefore entered for the defendant Board, with costs.\*

[Plaintiffs' Attorneys, CALDECOTT & PHEAR.]  
[Defendants' Attorney, D. J. HAARHOFF.]

\* This judgment was reversed by the Supreme Court on August 29 and against this decision leave has been granted to appeal to the Judicial Committee of the Privy Council.

STANDARD BANK *vs.* WARD.

*Provisional sentence.—Liquid document.—Pledge of shares.*

*Provisional sentence refused on a document pledging shares as security for an overdraft of a current account with a bank up to a certain amount, which amount was alleged in the summons to be due and owing.*

This was an application for provisional sentence for the sum of £8000, alleged to be due and owing on a certain acknowledgment of debt and pledge of shares by which the defendant, in consideration of being allowed to overdraw his current account with the Bank to any amount not exceeding £8000, pledged and delivered certain shares, which the summons prayed might be declared executable, as security for such overdraft. A copy of the defendant's current account was annexed to the summons, shewing a debit balance of £8281 1s. 7d., and an affidavit was filed by the local manager of the Bank stating that this was the present amount of the overdraft.

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—  
Standard Bank  
*vs.* Ward.

*Frames*, for the plaintiffs, contended that the document produced was an undertaking to pay any sum which might be due up to £8000, the amount now alleged to be due and owing.

*Guerin*, for the defendant, was not called upon.

The COURT refused provisional sentence, holding that the document was not a liquid one, being merely a pledge of shares to cover future debts. The actual amount of the defendant's indebtedness to the Bank required proof by extrinsic evidence, as was sufficiently indicated by the fact that an affidavit on the subject had been filed. The plaintiffs should have either obtained the defendant's signature and sued on a stated account or, failing that, should proceed by action in the ordinary manner.

[Plaintiffs' Attorneys, GRAHAM, VIGNE & MALLETT.  
[Defendant's Attorney, D. J. HAARHOFF.]

## STENT vs. GIBSON BROTHERS.

*Architect's plans.—Liability of carriers.—Measure of damages.*

*S., an architect at Kimberley, prepared certain plans and specifications for a hospital, in response to an advertisement from a hospital committee at Pretoria, inviting such designs and offering a premium of £25 for those accepted. The designs, which were marked "to be returned" and of which S. had not been able to make copies, were received by G., a carrier, for transmission and delivery and were lost by him. In an action for damages sustained by the loss, held, that the damages were not to be measured by the chance of obtaining the premium offered, but by the value of the time, labour and skill employed in the preparation of the plans and specifications.*

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—  
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The plaintiff in this action, an architect at Kimberley, sued the defendants, a firm of coach proprietors, forwarding agents and carriers, for the sum of £143 15s. as the value of a parcel lost by them. The defendants admitted their liability to compensate the plaintiff for the loss of the said parcel and tendered the sum of £25. The only question therefore was one of value, and it appeared from the evidence that the parcel consisted of plans and specifications for a hospital which it was proposed to build at Pretoria in the South African Republic. The plaintiff had prepared these plans and specifications in response to an advertisement of which a copy had been sent to him and which was worded as follows: "To Architects. Plans and specifications for the Volks Hospital for forty patients, rooms for servants, &c., will be received by the Hospital Commission up to Friday, the 9th December next. Further particulars may be obtained from the undersigned. A premium of £25 will be paid for the plans and specifications accepted. FRITZ STIEMENS, Secretary, Hospital Commission." Further particulars had also been obtained, stating that the cost of the building was to be from £2000 to £3500. The plaintiff, on going into the matter, had found that the cost of providing the accommo-

dation mentioned would largely exceed the above amount, and had accordingly prepared two sets of plans and specifications, the one shewing what could be done for £3500 and the other affording the accommodation desired, but at a cost of £8000. These documents he had marked "to be returned," and forwarded to Mr. Stiemens at Pretoria through the agency of the defendants, by whom they appeared to have been lost in transit. His claim was made on the basis of one and a quarter per cent. on the above sums, that being according to his evidence the minimum charge which an architect would make if instructed to prepare such documents. He estimated the actual value of the time, labour and professional skill employed by himself and his assistants in their preparation at not less than 100 guineas, but before the case came on for trial he had, in order to avoid litigation, offered to accept the sum of £50 as compensation for their loss. He had not had time to make copies of most of the drawings and specifications, and, if they had not been accepted by the Hospital Committee and had been returned to him as directed, opportunities would probably have occurred of using them elsewhere. The plaintiff also stated that, as he understood the advertisement and according to professional custom, if his designs had obtained the premium they would still have remained his property, and the Hospital Committee would not have been entitled to avail themselves of them without making an arrangement with him as architect. Another architect, a Mr. Day, called for the plaintiff, corroborated him with regard to this understanding, and stated that he should estimate the value of the work done and expenditure of time and labour, as described by the plaintiff, at fifty guineas. It was impossible to put a market value on plans and specifications made for a particular purpose for which they were not used. The only witness called for the defendants was another architect, who stated that, according to the terms of the advertisement, he should have considered the Hospital Committee entitled to retain any plans and specifications of which they approved on payment of the premium offered, and to have given the commission for the work to another architect, for which purpose they would indeed presumably have chosen a local architect. He admitted, how-

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ever, that in his own experience this course had not been actually adopted and that if the plans were marked "to be returned" they could not have been so used except by special arrangement.

*Joubert*, for the plaintiff, on the question of the measure of damages, referred to *Mayne on Damages*, 3rd Ed. pp. 47 and 189, and the cases there cited of *Watson vs. Ambergate Railway Company*, 15 Jur. 448; *Grafton vs. Armitage*, 2 C. B. 336; *Bird vs. McGaheg*, 2 C. & K. 707. As the plaintiff had offered to accept £50 as compensation he would not press the claim for a larger sum.

*Hopley, C.P.*, for the defendants, contended that the plaintiff, in competing under the conditions laid down, would not, even if successful, have been entitled to anything more than the premium of £25, and that therefore the tender represented the maximum damages he could have sustained. If he marked the plans "to be returned," this was not in compliance with the rules of the competition and, had they been returned to him, they would have been of no appreciable value.

LAURENCE, J.P.:—The only question to be determined in this case is that of the amount of compensation which the defendants must be ordered to pay the plaintiff for the plans and specifications lost by them. With regard to the value of this parcel I am unable to accept either the basis of calculation set up by the plaintiff, in his declaration and the particulars subsequently supplied, or that set up by the defendants in their plea. To charge on the basis of a percentage on the estimated cost of the works designed may be a very proper method when the work has been done on commission, and the architect has been specially instructed to prepare designs and estimates; but that is not the present case, and the plaintiff's claim made on this basis cannot therefore be sustained. Neither can I adopt the defendant's view that the utmost reward which the plaintiff could have obtained for these plans would be the premium or prize of £25, offered by the Hospital Commission to the successful competitor, and that therefore this amount represents the highest

value which can be placed on the parcel. It is quite uncertain whether the plaintiff's plans, if they had been received by the Commission, would have obtained this prize, and the chance of obtaining it is in my opinion too remote a matter to enter into the assessment of damages. This view is on the whole confirmed by the case of *Watson vs. Ambergate Railway Co.* referred to by Mr. Joubert, and by the comments of Mr. Mayne thereon in his well-known work on "Damages:" "There is one case," he says, "in which there seems to have been a difference of opinion between two learned judges. A prize had been offered for the best model of a machine for loading barges. The plaintiff had sent one by railway but, through the negligence of the defendant, it arrived too late, and the plaintiff lost his chance of the prize. A question arose as to the measure of damages, whether it was the value of the work and materials, or whether the prize might be taken into consideration. Patteson, J., seemed to think it might; he said, 'The plaintiff had put his damage upon a right principle, for he said the goods were made for a specific purpose, which has been defeated by the negligence of the defendant, and they have become useless.' Erle, J., said, 'I have had great doubts whether that chance was not too remote and contingent to be the subject of damages.' No decision was given, as the case went off upon a different point. It is apprehended, however, that the opinion of Erle, J., was the true one. The question seems to come to this: was the plaintiff's chance of winning the prize a matter of such an ascertainable value *at the time of entering into the contract* of carriage, as to have been capable of contemplation by both parties? If it was not ascertainable then, it is difficult to see how it could have formed part of the contract, and if it did not form part of the contract, it could not enter into the damages for breach. Suppose the same carrier had been entrusted with all the models sent for competition, and delayed them all, should he pay the amount of the prize to each, or apportion it among them, or how? Even if the actual judges gave evidence that a particular model would have won the prize, still this would be matter *ex post facto*, not known at the time of the bargain, and forming no part of it." Adopting the view here ex-

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pressed, I do not think any special importance can be attached to, or any material guidance in our decision afforded by, the amount offered as premium or the other particulars supplied to the plaintiff by the Hospital Commission. On the evidence before us I should say that if these designs had been received by the Commission they would have been bound, if they did not accept them, to return them to the plaintiff, when he might or might not have been able to use them in other quarters, or, if they accepted them, they would have found it necessary either to accept his services as architect or to make some other arrangement with him before utilizing them for the object in view. It is impossible to suppose that the plaintiff, or any other professional man of any standing, would have expended all the time and trouble and professional skill which the preparation of these documents involved with no further object in view than the chance of obtaining a premium of £25. It seems to me that in the case of a professional man, spending his time, labour and skill in the production of some article, we must take the value of such time, labour and skill, or in other words the cost of production, as the measure of damages in the event of its loss. The defendants as carriers received this parcel, and it appears from the evidence that the plaintiff specially informed them of its nature and contents, and of the importance he attached to its due transmission and delivery, a duty which they undertook for reward and which they have failed to perform. There does not appear to have been any condition made by the defendants, as is sometimes made by Railway Companies and other carriers, limiting their liability, in the absence of a special declaration of higher value, and payment of a special fee in the nature of an insurance, to a certain amount. That being so, we must simply take the value of the article made by the plaintiff, and entrusted by him to the care of the defendants in good faith and for a reasonable purpose, as ascertained by the cost of production, as the measure of damages for which they are responsible. Suppose, for instance, the plaintiff was not an architect but an artist. We might take the analogous case of an artist living at Birmingham, painting a picture there, and sending it to London by the railway for exhibition

at the Royal Academy. If the picture were lost in transit, we could not take into consideration in assessing damages the possibility of the picture being purchased by the trustees of the Chantrey Bequest, or by some private purchaser at a fancy price. Neither could we say that, because the picture might have been returned unsold and remained on the hands of the artist, he had sustained no ascertainable damage by its loss. I take it that in such a case the Court would have to consider the value of the artist's time, and the amount of time spent on the production of the picture and other similar points in order to arrive at an estimate of its value and of the damage sustained by its loss. Applying a similar test to the present case, and bearing in mind the offer made by the plaintiff to accept the sum of £50 as compensation, and the independent evidence of Mr. Day as to the value of the time and skill stated by the plaintiff to have been employed on the production of these designs, I am of opinion that a judgment for the plaintiff for the sum of £50 and costs will meet the requirements of the case.

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SOLOMON and COLE, JJ., concurred.

[Plaintiff's Attorneys, CALDECOTT & BELL.]  
[Defendants' Attorney, DEWHURST.]

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## MAGISTRATE'S COURT CASES REVIEWED.

## QUEEN vs. ALEXANDER.

*Act 13, 1886, § 2.—Negligence by Cabdriver.—Magistrate's Jurisdiction.*

*On a charge of contravening sect. 2 of Act 13, 1886, it is necessary for the Crown to furnish at least as strong proof of negligence as would be required of a plaintiff in a civil action for damages caused thereby. In the absence of such proof, a conviction under the section was quashed on review. Magistrates, in trying cases under this section, are not entitled to pass sentences exceeding the amount of their ordinary jurisdiction.*

1888,  
March 7.  
Queen vs.  
Alexander.

LAURENCE, J.:—A case has come before me in review from the police magistrate of Kimberley, in which a man named Alexander was charged with contravening sect. 2 of Act 13 of 1886 by negligently driving a cart and horses over one Llewellyn, a child about two years of age, and thereby breaking his leg. The prisoner was convicted and sentenced to six months hard labour. The section is as follows: "Any driver or other person having the charge of any carriage or vehicle injuring any person by negligence shall upon conviction be liable to a fine not exceeding one hundred pounds sterling, or, in default of payment, to imprisonment, with or without hard labour, and with or without spare diet, for any period not exceeding two years, or to both such fine and such imprisonment." <sup>x</sup>There is nothing in the section extending the ordinary jurisdiction of magistrates, and the utmost sentence which it was competent for the magistrate to impose was therefore one of three months hard labour. On the facts, however, I do not think that the conviction can be supported. By the section in question cabdrivers are made criminally responsible for negligence: and it is

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certainly necessary that there should be at all events equally clear proof of negligence in such cases as the Court would require in a civil case. In the present case the child, which fortunately sustained no permanent injury, was of course too young to give evidence. The only witness for the prosecution, who actually saw how the accident happened, gives the following account of it: "I watched the child go out and cross the road. I saw a cab driven from the direction of the mine. When in the middle of the road he pulled his horses to the right. The driver called to the child and drew the reins in. He did not stop them, merely checked them. The off or right hand horse knocked the child down and the right wheel passed over it. I called to the driver, the prisoner, to stop. He drove on, saying it was not his fault. . . . The prisoner was not driving fast." There seems to be nothing in this evidence to shew that the accident was caused by negligence on the part of the prisoner, neither is this proved by the fact that, as stated by another witness, he was on the wrong side of the road. This would be very material if it were a case of collision between two vehicles; but I do not see that it amounts in itself to negligence or in any way tends to shew that the injury to the child was caused by negligence on the part of the driver. So long as the road was clear, he was entitled to take his own course; if he met or passed another vehicle it was his duty to take his proper side; and on whichever side he was he was equally bound to use due diligence not to injure anybody. A witness who was a passenger in the cart was called for the defence and stated that the prisoner was driving carefully; this witness did not see the child or know that it was injured. No doubt it is very proper that if cabdrivers by reckless driving, such as in the experience of all of us is far too common here, injure other people, they should be punished for that offence, and the section under which the prisoner was charged is in my opinion a very useful and salutary enactment. But on the other hand it is equally notorious that if young children or babies, as in the present case, are allowed to play about in the streets, it is often extremely difficult for the most careful driver to avoid running over them. In the case of a statutory offence, such as the present,

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just as in the case of any other crime, it is the duty of the Crown to clearly prove the prisoner's guilt. In the case under review I think there was no such proof, and the *Crown Prosecutor*, who has seen the papers, is not prepared to support the conviction, which will accordingly be quashed.

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QUEEN vs. ZOETWATER.

*Act 27, 1882, sect. 8, clause 5.—Police offences.—Messenger of R. M. Court.*

*Hindering the messenger of a Resident Magistrate's Court, in the execution of his duty as such, is not an offence punishable under clause 5 of sect. 8 of Act 27, 1882, even though the messenger happen also to be the chief constable of the district.*

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—  
Queen vs.  
Zoetwater.

SOLOMON, J. :—A case came before me in review from the Resident Magistrate of Barkly West, in which a prisoner named Jan Zoetwater was charged with contravening clause 5 of sect. 8 of the Police Offences Act, 27 of 1882, by hindering one Flannery, the messenger of the magistrate's Court, Barkly West, in the execution of his duty. The only witness called for the prosecution was Flannery himself, who deposed that on the 9th of March last he went to execute two writs against the movables of the accused's brother, and that whilst driving in certain stock, which he had attached, along the road to Barkly West, he met the prisoner, who rode furiously among the stock and so scattered the animals that they could not be again collected together. Zoetwater was found guilty and sentenced. Clause 5 makes it an offence for any person to hinder or disturb any constable, policeman, or officer of any local authority in the execution of his duty. Now it is true that Flannery happens to be the chief constable as well as the messenger of the Court, but he was acting on this occasion in the execution of his duty as messenger and not as chief constable, and clearly therefore the prisoner was not guilty of hindering or disturbing him in the execution of his duty as a constable. The conviction must be quashed.

## QUEEN vs. SAUL.

*Theft.—Possession.*

*Where a prisoner had been convicted of stealing a horse, and the only evidence against him was that he was found in possession of it more than six months after it had been lost, and he explained that he had released the horse out of the pound at the request of a third party, who had requested him to keep it as security for the fees, and produced a receipt from the poundmaster which supported his statements, the conviction was quashed.*

LAURENCE, J.P.:—Antonie Saul was charged with three others on April 21, before the assistant magistrate of Barkly West, with having, on or about April 19, stolen a mare the property of one Louw. The evidence was to the effect that Louw lost the mare, which was hobbled on his erf, last October. On April 19 the prisoner Saul was seen riding the mare, in company with the other prisoners. He refused to give it up when claimed, and the whole party were arrested. On this evidence the other prisoners were discharged, but Saul was convicted and sentenced to receive twenty-five lashes. This is not a case of possession of property which had been very recently stolen, as the mare had been missing for more than six months before it was found in possession of the prisoner. At the same time in the circumstances he might properly be required to justify his possession; and the account he gave was that last December a man named Jan, or Jackson, asked him to release two of his horses which were impounded, and that he did so, paying £1 19s. in pound fees. Jan then told him to keep one of the animals until he returned from the Transvaal, when he would redeem it, and this animal was the mare claimed by Louw. In support of this statement the prisoner produced the poundmaster's receipt for the fees. The receipt describes the animals as "two mares impounded on November 7, 1887," and is endorsed "these horses released by Tony Saul on account of Jackson." There is no reason to doubt that

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this receipt referred to the animal in question, in which case it is clear that it was not stolen by the prisoner on April 19, neither is there anything in the facts to support the inference that he received it knowing it to have been stolen. The case was a proper one for inquiry, but the evidence does not appear to warrant the conviction, which must therefore be quashed.

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VOL. V.]

[PART II

# REPORTS OF CASES

DECIDED

# IN THE HIGH COURT

OF

# GRIQUALAND.

REPORTED BY

P. M. LAURENCE, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

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VOL. V.—PART II.

JULY, 1888, to JUNE, 1889.

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CAPE TOWN:

J. C. JUTA & CO.

1890.



# HIGH COURT OF GRIQUALAND.

JULY, 1888, TO JUNE, 1889.

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P. M. LAURENCE [Judge President].

W. H. SOLOMON [First Puisne Judge].

A. W. COLE [Second Puisne Judge].

W. M. HOPLEY [Crown Prosecutor].\*

\* Absent on leave from May 29, 1888, to Jan. 12, 1889.

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2. — <i>Delivery</i> .— <i>Dominium</i> .— <i>Rescission of Contract</i> .—A mining company agreed to sell to F., an engineer, two engines for a certain price, to be paid not in cash but in work and labour and in effecting repairs to other machinery. F. then proceeded to remove some of the fittings of the engines, with the knowledge of the company's manager, who, as F. alleged but as he himself denied, at the same time authorised him to remove the engines. Before he had done so however the company discovered that F.'s execution of the repairs which he had in hand was unsatisfactory and inefficient and accordingly declared the contract at an end. F. sued for the "restoration" of the engines, which were still on the company's premises, and for damages for their detention: <i>Held</i> (SOLOMON, J., <i>diss.</i> ), that the property in the engines had not passed: <i>Held also</i> , unanimously on the facts, that, assuming the property not to have passed, the defendants were entitled to rescind the contract and resist the claim for specific performance. <i>Friis vs. British United D. M. Co.</i> .. .. .	270
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2. — <i>Magistrate's Discretion.—Amendment of Record.</i> —T. sued B. in the Magistrate's Court on an account for work and labour. B. at the trial admitted his liability for certain items but disputed the rest of the account on the ground that the additional work had been necessitated by the plaintiff's own negligence. The Magistrate held that there had been negligence by both parties, necessitating the additional work, and on this ground gave judgment only for the amount admitted and ordered each party to pay their own costs: <i>Held</i> , on appeal, that the Magistrate had not exercised a judicial discretion as to costs and that, in the absence of any previous tender, the plaintiff was entitled to the costs up to the date of the defendant's admission of liability for the amount recovered. An application having been made by the defendant for an order on the Magistrate to amend the record by inserting a statement made by himself, in reply to a question from the Court, to the effect that he had made the plaintiff certain offers for a settlement out of Court, and it appearing on reference to the Magistrate that this statement, which was denied by the plaintiff, had actually been made, but had not been recorded as being immaterial, the Court, holding that the statement did not in fact affect the issue, refused the application but made no order as to the costs thereof. <i>Tarry &amp; Co. vs. Brown</i> .. .. .	305
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3. — See Contract of Sale (3) .. .. .	353
DEED OF SALE.— <i>Suspensive Condition.</i> — <i>Dominium.</i> —Where an engine was sold and delivered by A. to B. on the conditions that it should be paid for by instalments, and that until the last instalment was paid it should remain and be deemed the property of A., and if the instalments were not punctually paid it should revert to A., and all payments made on account of the purchase price should in that event be regarded as payments made on account of rent or hire: <i>Held</i> , that this was a sale with a suspensive condition and that, B. having failed to pay all the instalments, the property remained in A. <i>Harvey and another vs. Martin</i> .. .. .	167
1. DELIVERY.—See Contract to Exchange Shares .. .. .	161
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DIVISIONAL COUNCIL.— <i>Derelict Lands.</i> — <i>Acts 4 of 1865, 3 of 1879, 28 of 1881 and 24 of 1887.</i> —On certain derelict land, held on quit-rent tenure from the Crown, land rent was overdue to the Government and rates to the divisional council for a period	

exceeding five years. The Government gave notice under Act 3 of 1879 of their intention to resume possession. Before the statutory interval had expired, the divisional council, on an *ex parte* application, obtained an order in chambers, under Act 28 of 1881, for the attachment and sale of the land in question to satisfy their claim for rates. An application made on behalf of the Government to set aside this order was refused. In proceedings instituted by a divisional council, a warrant to sue signed by the civil commissioner as chairman is necessary only where such warrant is required under the rules of Court.

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*Scrutiny.—Corrupt Practices.—Agency.—Constitution Ordinance.*—Acts 21 of 1859, 14 of 1874 and 9 of 1883.—On an

election petition which, the seat being claimed by the petitioner, involved a scrutiny, the votes of persons disqualified from voting under sect. 35 of Act 9 of 1883 were struck off the poll, notwithstanding the provisions of sect. 50 of the Constitution Ordinance; but with regard to persons not entitled, under the provisions of sect. 10 of the said Ordinance, to be registered as voters or to vote, the register was held to be conclusive and the votes of such persons were therefore not struck off. The employment of electors as members of a band or as cab-drivers is not in itself a corrupt practice, neither does it disqualify such electors from voting under sect. 35 of Act 9 of 1883. Where a successful candidate after an election presented a voter, who had taken an active part in his favour by speaking at public meetings, but who had not canvassed for him or otherwise acted as his agent, with certain shares as a “souvenir” of the election: *Held*, that such presentation did not in itself amount to a corrupt practice, neither did it disqualify the recipient as a paid agent. The surnames of certain electors were misspelt on the register: *Held*, there being no doubt as to their identity, that their votes were good. An elector can only vote once. Where certain electors, who were entitled to vote for four candidates, after giving one or more votes at one polling station, afterwards voted elsewhere, the later votes were struck off the poll. A certain association having been formed in connection with the election, and having resolved to support certain candidates, and having given a “smoking concert” at which a number of voters were supplied with liquor and cigars: *Held*, on the facts, that the agency of this association for the candidates whom it supported had not been proved and that therefore the entertainment in question did not amount to a corrupt practice by a candidate’s agent. *Lord vs. O’Leary* .. 312

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INDICTMENT.—*Stamp Acts*.—*Broker*.—A person carrying on the business of a broker without the licence required by the tariff contained in the Schedule to Act 20 of 1884 is liable to prosecution under sect. 6 of Act 13 of 1870. P. was convicted of broking without a licence. The only evidence was that he had in one case sold and in another received for sale certain ostrich feathers on commission: *Held*, on review, that the Crown had failed to prove that P. exercised the trade or calling of a broker, as defined by sect. 3 of Act 38 of 1887, and the conviction must therefore be quashed. *Queen vs. Plockey* .. .. . 368

INSOLVENCY.—*Trustee*.—Ord. 6, 1843, §§ 48, 52.—Where the trustee of an insolvent estate had left the colony previous to the confirmation of his appointment, the Court, without making an order for his removal, directed a special meeting of creditors to be held for the election of another trustee. *In re Estate of Schiff* .. .. . 295

INTERDICT.—See Computation of Time .. .. . 249

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1. JOINT STOCK COMPANY.—*Prospectus*.—*Misrepresentation*.—*Rescission of Contract*.—Where a plaintiff had applied for shares in a mining company on the faith of a prospectus which announced that the company was “to be incorporated with limited liability,” and about eighteen months afterwards brought an action for the rescission of his contract to take shares on the ground that the company had not been so incorporated, and it appeared that the delay in registration under the Companies Act had arisen through accidental circumstances for which the company was not to blame, and of which the plaintiff was or might have been aware, and the company had in fact been registered before the action was tried: *Held*, that the plaintiff was not entitled to be released from his contract. *Geddes vs. Kaiser Wilhelm G. M. Co.* .. .. . 178

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LAND COURT.— <i>Title.—Rectification.—Exception.—Ord. 13, 1876, G. W.</i> —A. and B. had a dispute as to the boundaries of their farms. B. obtained a judgment of the Griqualand West Land Court allowing his claim to his farm subject to the future settlement of the boundary line. Subsequently title was issued to him by the Colonial Government with a diagram annexed including the ground in dispute within his boundary. A. brought an action in which he claimed this ground and prayed for a declaration of rights and amendment of titles and diagrams. An exception to this declaration, on the ground that it disclosed no cause of action, was overruled with costs. <i>Jacobs and another vs. Vorster</i> .. .. .	199
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MAGISTRATE'S JURISDICTION.— <i>Procl. 41 of 1872, G. W.—Act 16, 1882, § 12</i> —The jurisdiction of the Additional Magistrate for the District of Kimberley is limited to the area defined by Proclamation 41 of 1872, G. W., this Proclamation not having been impliedly repealed, nor the jurisdiction extended to the whole District, by the provisions of Act 16 of 1882. <i>Queen vs. Tommy</i> .. .. .	382
MARKET-MASTER.—See Game Licence .. .. .	159
MASTER AND SERVANT.— <i>Wrongful Dismissal.—Justification.—Measure of Damages.</i> —H. sued D., a tradesman by whom he had been employed, for wrongful dismissal. D. justified on the ground that H. had assaulted a fellow-servant and created a disturbance on his business premises: <i>Held</i> , on the facts, that the assault, which was to some extent provoked, and the consequent disturbance, which was not proved to have in any way injured D. in his business, did not afford sufficient justification for summary dismissal, and that H. was therefore entitled to damages equivalent to a month's salary in lieu of notice. Where the period over which the contract of service extended was still unexpired when the action for wrongful dismissal was tried, the Court gave as damages the amount of unpaid salary for the whole period in the absence of any evidence that the plaintiff could or was likely to obtain other employment for any portion of the period in question. <i>Haupt vs. Diebel Bros.</i> ..	185
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MESSENGER OF R. M. COURT.— <i>Execution of Writ.—Negligence.—Ord. 37, 1828, § 8.—Act 20, 1856, § 53, and Sched. B, § 58.</i> —In an action against the Messenger of a Magistrate's Court for	



- damages sustained owing to his negligence in executing a certain writ: *Held*, that there was some evidence of negligence on the part of the defendant but that, as it did not appear that the plaintiff had sustained any damages thereby, the action must fail. Where property which the Messenger was about to attach was claimed by a third party, and he thereupon reported the claim to the plaintiff's attorney, and applied for an indemnity which was not given: *Held*, that in the circumstances of the case he was justified in not proceeding with the attachment. *L. & S. A. Exploration Company vs. Haybittel* 170
- MISREPRESENTATION.—See Joint Stock Company (1) .. .. 178
- MOHAMMEDAN LAW.—*Mosque — Vakheels. — Appointment and Dismissal of Imam.*—According to Mohammedan Law, the founder of a mosque, or the duly appointed Vakheels or Trustees, as the representatives and with the consent of the majority of the congregation, have the right on any reasonable ground to summarily dismiss the Imam or Priest. A site for a mosque was granted by the owners of the soil to the Indian Mohammedan Community at Kimberley and a lease was subsequently executed, demising the property to trustees on their behalf and for that purpose. Previous to the execution of the lease, the Indian Mohammedans, finding themselves unable to erect the mosque without the assistance of other members of the same faith, obtained such assistance on the understanding that the mosque when completed should belong to the general Mohammedan community. In pursuance of this agreement, the mosque was built and the Imam was elected and his stipend paid by the general body of Mohammedans. Subsequently the Indians claimed the right to dismiss the Imam without consulting and contrary to the wishes of the other and larger portion of the congregation. An action brought to enforce this claim was dismissed with costs. *Hessen and others vs. Duout* .. .. 214
- Mosque.—See Mohammedan Law .. .. .. *Ib.*
1. MUNICIPALITY.—*Act 45, 1882. — Bye-law. — Publication. — Ultra vires. — Costs.*—Where a municipal bye-law has been approved and published, as provided by sect. 111 of Act 45 of 1882, it is not necessary in a prosecution for its contravention to adduce formal proof of such publication. A bye-law rendering it an offence to disobey the directions of a municipal sanitary inspector or other officer duly appointed was held not to be *ultra vires* as unreasonable. A municipality was empowered by one of its regulations to remove rubbish. The occupier of certain premises refused to obey the directions of a sanitary constable given with a view to the exercise of this power on the ground that he preferred to do the work himself, and for this refusal was convicted of contravening the aforesaid bye-law. On appeal, this conviction was confirmed but an application by the respondents for costs was refused. *Wightman vs. Baconsfeld Municipality* .. .. .. 206
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1. PRACTICE.—See Provisional Sentence .. ..	197
2. — <i>Burden of Proof.—Right to begin.—Act 10, 1872, § 54.</i> — In an action for the forfeiture of a cart and horses used for the removal of smuggled goods, where the only defence pleaded was that the cart and horses had been so used without the consent or knowledge of either the owner or his agent: <i>Held</i> , that the burden of proof of such absence of knowledge or consent lay with the defendant. <i>Collector of Customs vs.</i> <i>Maree</i> .. ..	303
1. PRINCIPAL AND AGENT.— <i>Share-broker.—Custom of Share-</i> <i>market.</i> —T., a share-broker at Kimberley, bought certain shares on instructions from B., for which payment was to be made on their delivery from Natal. Shortly after the contract was made B. left Kimberley for the Orange Free State, leaving behind him certain dishonoured cheques and intending, as was alleged, to abscond and defraud his creditors. Criminal proceedings were taken against him and he was arrested and his extradition applied for. Meanwhile T., who alleged that by the custom of the market he had made himself personally responsible to the vendors in Natal, sold and delivered the shares to a third party in order to protect himself. B. however returned to Kimberley before the arrival of the scrip, of which the market value had meanwhile considerably increased, and on its arrival demanded delivery: <i>Held</i> , on these facts, that B. was entitled to recover damages from T. for breach of contract. <i>Bernstein</i> <i>vs. Tayler</i> .. ..	258
2. — <i>Broker.—Payment by Broker to Vendor.—Custom of Share-</i> <i>market.</i> —N., a broker, sold certain shares at Kimberley for J. to W., who lived in Natal, and handed J. a broker's note, according to the terms of which payment was to be by "sight draft, scrip attached." A similar note was forwarded to W.	

On the same day N., as was customary in such transactions, paid J. the purchase price less brokerage and received from him the shares. N. then drew on W. for the amount but the bill was dishonoured on presentation. N. thereupon requested J. to refund the amount paid and take back the shares and on his refusal resold them at a loss. By the custom of the share-market and in the view taken by the parties to this transaction W., though residing in another colony, was not regarded as a foreign principal. On a special case stating these facts the Court held that N. was not entitled to recover from J. the amount lost on the resale of the shares. <i>Niebuhr and another vs. Joel</i> .. .. .	335
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PROVISIONAL SENTENCE.— <i>Jurisdiction.—Practice.—Pactum de non petendo.</i> —M. & Co. sued P. in the Magistrate's Court on a dishonoured cheque. P. pleaded an agreement to give time for payment made with M., an absent member of the plaintiff firm. After the pleadings had closed, the Magistrate postponed the hearing in order to obtain the evidence of M. The plaintiffs then, without notice to the defendant, withdrew the case and applied to the High Court for provisional sentence. P. objected that the Court had no jurisdiction, the plaintiff having elected another forum where issue had been joined, and also raised the same defence as in the Magistrate's Court. The Court, without ruling on the preliminary objection, held that the defendant's allegations, in the absence of contradiction by M., were sufficient to justify the refusal of provisional sentence, but by consent of parties granted final judgment for the amount claimed, execution to be stayed till the expiration of the period for which the defendant pleaded that time had been given. <i>Mitchell &amp; Co. vs. Purdey</i> .. .. .	197
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SUNDAY TRADING.— <i>Barber.—Ord. 4, 1857, § 1.—Ord. 1, 1858, §§ 2, 3.</i> —Carrying on the occupation of a Barber on Sunday is	

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not "trading" within the meaning of Ord. 1 of 1838. <i>Marks</i>	
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SUSPENSIVE CONDITION.—See Deed of Sale .. .. .	167
TITLE.—See Land Court .. .. .	199
TRAMWAY.— <i>Level Crossing.</i> — <i>Negligence.</i> — <i>Contributory Negligence.</i> —M., a cab-driver, met with an accident while crossing a tramway belonging to a mining company and leading from the mine to their depositing floors. It appeared that he was driving along the road in a direction in which the view of the tramway was obstructed by houses. Just as he approached a level crossing, an engine came up and a collision became imminent but was narrowly avoided. The horses he was driving however became restive and he was thrown out and hurt. There was no signalman at the crossing and the driver of the engine neither whistled nor slackened speed on approaching it: <i>Held</i> , on these facts, that the accident was caused by the negligence of the defendant company and that contributory negligence on the part of M. was not established. <i>McLaren vs. Consolidated D. M. Co., Bultfontein</i> .. .. .	202
TRUSTEE.—See Insolvency .. .. .	295
ULTRA VIRES.—See Municipality (1) .. .. .	296
USE AND OCCUPATION.— <i>Compensation for Improvements.</i> — <i>Pleading.</i> — <i>Set off.</i> — <i>Exceptio rei iudicatae.</i> —A. sued B. for ejection from certain land and obtained an order therefor conditional on the payment of a certain sum found to be due to B. for improvements. The order was not enforced and B. remained in possession. After some time had elapsed A. brought another action against B. for use and occupation and B. pleaded, and it was admitted, that the sum awarded him as compensation, which exceeded the amount of the present claim, was still unpaid, and at the hearing obtained leave to amend his pleading by adding a special plea of set-off. On these facts, the Court granted the defendant absolution from the instance. <i>L. &amp; S. A. Exploration Company vs. Muller</i> .. .. .	216
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# CASES DECIDED

IN THE

## HIGH COURT OF GRIQUALAND.

### VOL. V.—PART II.

#### BEDDOME vs. THE QUEEN.

*Game Licence.—Market-Master.—Plea of Guilty.—  
Act 36, 1886, § 4.*

*B., a market-master, pleaded guilty to contravening § 4 of Act 36 of 1886, by selling game without a licence, and was convicted of that offence. It appeared that the owner of the game, on whose behalf B. sold, held a licence under the Act: Held, that the owner was the seller and B. merely acted as his agent and, as the evidence negatived the commission of the alleged offence, notwithstanding the plea the conviction must be quashed.*

E. I. Beddome was charged before the Police Magistrate of Kimberley with contravening sect. 4 of Act 36 of 1886, by selling a spring-buck on the Kimberley market without the licence required by law, and to this charge, after an exception to the jurisdiction of the Police Magistrate had been taken and over-ruled, he pleaded guilty. The evidence was to the effect that the accused in his capacity as assistant market-master had sold a spring-buck on behalf of one Eley. Eley held a game licence, but the accused had none. The section provides that “no person shall, save as is herein-

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after provided, kill, catch, capture, pursue, hunt or shoot at, sell, hawk or expose for sale, game in any part of this colony, without having previously obtained a game licence." The accused was convicted and a nominal fine imposed, and against this conviction he now appealed.

*Feltham*, for the appellant, submitted that, notwithstanding the plea of guilty, if there was no evidence to shew the commission of a crime, the conviction could not be sustained: Ord. 72, 1830, § 29; *R. vs. Charlie*, 2 E. D. C. 163, and cases there cited. He contended that the evidence shewed a sale by Eley and not by the accused, and referred to *Sayle vs. Jones*, Buch. 1876, 10; *R. vs. Barns*, Buch. 1879, 180, the effect of which decision was that the market-master must prove either that he was himself licensed or that he was selling for some licensed person, as in the present case; *R. vs. Cornell*, 1 Juta, 43; *R. vs. Greef*, 3 H. C. 363; *R. vs. De Kock*, *ib.* 488.

*Lange*, for the Crown, contended that under the provisions of the Act the market-master should take out an annual game licence, but he would not press the conviction if the Court thought it should be set aside on the ground that the owner of the game was shewn to have had a licence.

LAURENCE, J. P.:—The only question in this case seems to be who sold the buck. In accordance with the maxim *qui facit per alium facit per se*, and with the principles laid down in the cases which have been cited, it appears to me that the sale was really effected by Eley through the accused as his agent, and that as Eley had a game licence there was no contravention of the Act. It has been held in more than one case that, where a licence is necessary for any purpose, it is competent for the licensed person to employ an agent for that purpose without the latter taking out a separate licence; otherwise every shopkeeper's assistant might be required to take out a licence to sell. The main difficulty in the present case lies in the circumstance that the accused, though he had legal advice at the trial, elected to plead guilty. As, however, the evidence

taken appears not to support his plea, but to negative the commission of the alleged offence, the case is one in which an application to withdraw the plea might properly have been made and allowed (see *R. vs. Jack*, 2 H. C. 187). The accused by appealing has adopted a practically equivalent course, and for the reasons stated I think it is impossible to sustain the conviction, which must therefore be quashed.

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SOLOMON and COLE, JJ., concurred.

[ Appellant's Attorneys, CALDECOTT & BELL.]

### BARNATO BROTHERS vs. MUNRO.

*Contract to exchange shares.—Delivery.—Reasonable time.—  
Rescission.*

*M. employed a broker to exchange certain shares which he owned for shares in another company. The broker made a contract for this purpose with B. by which M. agreed to deliver his shares to B. "on or about April 20," and receive the other shares from B. in exchange. It was subsequently agreed that the exchange should be effected on April 23. On the morning of that day the broker called at B.'s office with M.'s shares, and was requested and agreed to call again to effect the exchange in the afternoon, but omitted to do so. On the following morning M. repudiated the contract: Held, that B. was entitled to maintain an action for its breach.*

On April 11, 1888, a contract was entered into between the plaintiffs and defendant in this action through Mr. Hazel, a broker at Kimberley, by which it was agreed that on or about April 20 the defendant should deliver to the plaintiffs 52 shares in the Central D. M. Co., valued at £35 each, in exchange for 43 shares in the De Beer's Mining Co., valued at £42 10s. each, the defendant agreeing to pay

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—  
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*vs. Munro.*

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to the plaintiffs the balance of £7 10s. in cash on the said day. The plaintiffs alleged that they duly tendered the De Beer's shares, but the defendant refused to deliver the Central shares, or perform his part of the contract, of which the plaintiffs now claimed specific performance, or £2500 as damages in default. The defendant admitted the contract as alleged, but denied the breach, and alleged that on April 20, and thereafter while the contract was in force, he was ready and willing to perform it, but no tender was made to him. On April 23 he delivered the Central Co. shares to the broker on behalf of the plaintiffs, but the plaintiffs refused to deliver the De Beer's shares in return therefor, in consequence of which breach of contract the defendant on the following day refused any longer to be bound thereby, and reclaimed his shares from the broker as he was entitled to do, and the plaintiffs acquiesced in the rescission and termination of the contract. The defendant further pleaded that time was of the essence of the contract and that, the plaintiffs having failed to tender the De Beer's shares on April 20, or within a reasonable time thereafter, the defendant was entitled to treat the contract as abandoned by the plaintiffs and to repudiate the same. The plaintiffs joined issue.

From the evidence it appeared that on April 10 the defendant instructed the broker, Mr. Hazel, to effect an exchange of his Central shares for shares in the De Beer's Co., *i.e.* to sell the former and buy the latter, or effect an exchange on the best terms procurable. He accordingly made the contract with the plaintiffs, in the terms set forth, and passed bought and sold notes for the two parcels of shares. The defendant subsequently arranged with the broker to effect the exchange on April 23, which was a Monday, and gave him the Central shares for that purpose. On the 23rd Hazel accordingly went to the plaintiffs' office with the shares, when Mr. Joel, a partner in the plaintiff firm, said he was rather busy, as it was mail day and he was preparing his shipment of diamonds, and asked him to call again in the afternoon, which he agreed to do, but omitted to do so. On the following morning he saw the defendant and told him he was just going to get the De Beer's shares,

but the defendant requested him to return the Central scrip, as he had no cover, which he accordingly did. He then returned to the plaintiffs, who informed him that the De Beer's shares were ready for delivery, but on his going back to the defendant and saying the De Beer's were ready, and asking for the Centrals to give in exchange, the defendant refused to give them back to him, and on the application being subsequently renewed he again refused. It appeared that since the contract was made the market value of Central shares had considerably increased, while that of De Beer's had fallen, and that, while on April 23 both Centrals and De Beer's were quoted at about £38, on the following day Centrals went up two or three pounds, while De Beer's remained at their previous quotation. The defendant in his evidence said that on the Monday afternoon the broker informed him that the plaintiffs had put him off, and that he thereupon instructed him to get the shares at once, as he wanted to sell them; Mr. Hazel, however, denied this conversation. The defendant, not having received the De Beer's shares on the Monday, on the following day insisted on the return of the Centrals, and considered he was no longer bound by the contract. These were the main facts of the case, and the details of evidence so far as material will be found sufficiently set forth in the judgment of the Court.

*Lange*, for the plaintiffs, contended that this was a special contract for which the defendant had employed Hazel, who acted throughout as his agent. He had agreed to the contract being performed on the 23rd and it was entirely through Hazel's neglect that it was not performed on that day. There was no breach on the part of the plaintiffs and nothing to justify the defendant's repudiation. As to time being of the essence of the contract, he referred to *Pollock on Contracts*, 3rd ed., 477.

*Guerin*, for the defendant, admitted that this was a contract of exchange, and referred to Juta's edition of *Burges's Commentaries*, p. 128. The plaintiffs should have proved an actual tender and not merely that they were ready and willing to perform the contract. In share tran-

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sactions time was of the essence of the contract: *Stewart vs. Ryall*, 5 Juta, at p. 152.

LAURENCE, J.P.:—In this case the contract upon which the plaintiffs sue is admitted by the defendant, and the only question for the decision of the Court is by which party that contract was broken. If we had only the broker's bought and sold notes to guide us it would appear from them that there were two contracts, one for the purchase by the plaintiffs of the defendant's Central shares, and the other for the sale by the plaintiffs to the defendant of the De Beer's shares. If that were so, as the notes make "cash on delivery of shares" a term of the contract, I should be disposed to hold that, while the plaintiffs might be entitled to sue for the delivery of the Central shares, they could not sue for the price of the De Beer's in the absence of an actual tender of the shares. But the parties are agreed that the contract was really one and undivided—namely to exchange the two parcels of shares—and, as there is nothing in the notes inconsistent with this construction, it must be adopted by the Court. That being so, we find that the defendant employed the broker, Mr. Hazel, to make this contract on his behalf. No doubt a share-broker is in some respects regarded as a mutual agent or as the agent of both parties; but primarily he is the agent of the person who employed him and from whom he received his mandate. Now with regard to the time for the performance of the contract, which was stipulated to be "on or about April 20," it does not seem to make any real difference whether Hazel, when he gave Munro the bought and sold notes, informed him, as Munro says, that this meant on either the 20th or 21st, or whether he stated, as he himself says, that it meant within three or four days of the 20th. I say that this makes no real difference because it is admitted that when Munro asked Hazel to effect the exchange on the afternoon of the 21st, which was a Saturday, Hazel offered to do so on the following Monday, the 23rd, and to this the defendant agreed. On Monday morning, Hazel accordingly called at the office of the plaintiffs to exchange the shares, and Mr. Joel, who happened to be busy at the moment,

asked him to call again in the afternoon, which he agreed to do. Hazel, as Munro's agent, agreed to carry out the contract on the afternoon of the 23rd, and by that agreement Munro was clearly bound. He had agreed to the performance of the contract on that day, and when a share transaction has to be performed on a particular day it has already been decided in this Court, in the recent case of *Palmer vs. Rhodes*, *supra*, p. 56, that it can be performed at any time, at all events during business hours, of that day. It is admitted that the plaintiffs were ready and willing to perform this contract on the 23rd; and the only reason why it was not then performed was the neglect of the defendant's agent, who omitted to call at their office as arranged. Then the next morning the defendant repudiated the contract, simply because his own agent had failed to keep his appointment on the previous afternoon. This repudiation cannot in the circumstances be justified and it entitled the plaintiffs to maintain an action for the breach. I have fully discussed the question of who was to blame for the non-performance of the contract on the 23rd on the assumption that, as contended by the defendant, time being of the essence of the contract, the defendant was entitled to rescind the agreement if the plaintiffs failed to perform it on the day which had been fixed for its performance. But, admitting that time was of the essence of the contract, it seems to me very difficult to hold that, although the afternoon of the 23rd was within the time, the morning of the 24th was beyond it. It is no doubt unfortunate that Mr. Joel should have been busy on the Monday morning, that Mr. Hazel should have omitted to call as arranged on the Monday afternoon, and that he should not have effected the exchange on the Tuesday morning, as the evidence shews he might have done, and gone to the defendant with the De Beer's shares in his pocket instead of returning the Centrals to him. But none of these unfortunate incidents justified the defendant in repudiating the contract, and the plaintiffs are therefore entitled to recover. As it appears that each party still holds the shares in dispute, the Court will order specific performance of the contract as prayed, but will give the defendant the option of paying

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the damages sustained by the breach, which must be assessed at the difference between the agreed price of the shares and the price on the 23rd, amounting as appears from the evidence—the value of the shares in both companies on that date being taken at £38—to the sum of £350. The defendant must pay the costs.

SOLOMON, J.:—I concur in the judgment which has been delivered, and I have very little to add to what has been said. My reason for thinking the plaintiffs entitled to recover is to a great extent based on the form of the pleadings and the admissions made by the defendant. If there had been two separate contracts it might have been necessary for the plaintiffs to prove not only that they were ready and willing to deliver but that they actually tendered delivery on the due date, and the absence of such tender might have justified the defendant in repudiating any further liability. But the agreement being really one for an exchange, it of course became necessary for one party to hand over his scrip for the purpose, and the evidence shews that this exchange was arranged by Hazl on behalf of the defendant and at his request, and that it was agreed between the parties that he should hand over his shares to the plaintiffs on the 23rd, and receive the others thereupon. The declaration alleges that “it was agreed that the defendant should on or about the 20th April deliver to the plaintiffs 52 shares in the Central Co., and that the plaintiffs should in return and in exchange for the same deliver on the said day to the defendant 43 shares in the De Beer’s Co.,” and this allegation is expressly admitted in the plea. This being the arrangement, the defendant on the 23rd omitted to carry it out, and on the following day refused to do so, and I concur in thinking that in the circumstances this refusal amounted to a breach of contract, for which the plaintiffs are entitled to recover.

COLE, J.:—I have felt a certain amount of doubt as to this case, but on the whole I agree in thinking that the defendant was not justified in repudiating the contract in

the circumstances set forth in the evidence, and that therefore there must be a judgment for the plaintiffs as already stated.(a)

[Plaintiffs' Attorneys, CALDECOTT & BELL.]  
[Defendant's Attorney, D. J. HAARHOFF.]

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## HARVEY AND ANOTHER vs. MARTIN.

### *Deed of Sale.—Suspensive condition.—Dominium.*

*Where an engine was sold and delivered by A. to B. on the conditions that it should be paid for by instalments, and that until the last instalment was paid it should remain and be deemed the property of A., and if the instalments were not punctually paid it should revert to A., and all payments made on account of the purchase price should in that event be regarded as payments made on account of rent or hire: Held, that this was a sale with a suspensive condition and that, B. having failed to pay all the instalments, the property remained in A.*

The plaintiffs in this action, Messrs. R. J. Harvey and R. Fenton, claimed the restoration of a certain engine which they alleged to be their property and to have been wrongfully removed and detained by the defendant. The defendant pleaded that he had purchased the engine from one Locker, who was the lawful owner of the same, and denied that it was the property of the plaintiffs or that they had any right to claim it. From the evidence it appeared that the plaintiffs had purchased the engine from the liquidators of the Gem Diamond Mining Co., to which Company it had been handed over by their lessees, Messrs. Smythe and Tucker, in part satisfaction of a debt. These gentlemen had themselves in January 1887 purchased the engine from the Compagnie Française on the conditions, embodied in a written agreement, that the purchase price should be £135,

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(a) Cf. the similar case of *Jock vs. Indurain*, tried in the Supreme Court on Aug. 13, and reported at 6 Juta, 137.

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to be paid in monthly instalments of £10, and that "the aforesaid engine and boiler shall remain and be deemed the property of the said sellers until the last instalment of the aforesaid purchase price has been duly paid. In the event of the purchasers failing to pay one or more of the aforesaid instalments when it or they become due, then and in that case the aforesaid engine and boiler shall revert to the said sellers, and all payments made on account of the purchase price of the same be looked upon and considered as payments on account of the rent or hire of the said engine, &c." It appeared that Messrs. Smythe and Tucker were irregular in the payment of their instalments, but did pay from time to time sums amounting in all to £106 15s., after which, being in difficulties, they appeared to have handed over the engine to their landlords, the Gem Company, as above stated, and to have left Kimberley. The Compagnie Française, considering that the engine had reverted to them, and apparently knowing nothing of what had taken place between Smythe and Tucker and the Gem Company, or of the subsequent sale from the liquidators of that Company to the plaintiffs, in the end sold the engine to one Locker for £120, from whom it was purchased by the defendant as set forth in his plea. The plaintiffs, having made an unsuccessful application in the matter to the Manager of the Cie. Française, then instituted the present action.

*Frames*, for the plaintiffs, said he was somewhat embarrassed by the production of the deed of sale from the Cie. Française to Smythe and Tucker, with the terms of which the plaintiffs previous to the trial had not been acquainted. He, however, contended that this document, followed by delivery, was sufficient to transfer the property to Smythe and Tucker, through whom the plaintiffs claimed. The position taken up by the Cie. Française, that they were entitled to receive and retain nearly the whole of the purchase money as well as the property sold, was quite untenable. He referred to *Keyter vs. Barry's Executor*, Buch. 1879, 175; *Pratt vs. Pittman*, 4 Jut., 189; *Harcombe and Rylands vs. Trustee of Ludelsohn*, *ib.* 225.

*Lange*, for the defendant, was not called upon.



LAURENCE, J.P.:—This case entirely depends upon the question whether the agreement between the Cie. Française and Messrs. Smythe and Tucker relating to this engine amounted to an out and out sale, or a sale with a resolatory condition, by which the property on delivery passed to the purchasers, through whom the plaintiffs claim, or whether it was a sale with a suspensive condition attached, in which case the property would remain in the vendors until the condition, namely the payment of all the instalments of the purchase money, was fulfilled by Messrs. Smythe and Tucker. In the latter event the case would fall within the principle of *Quirk's Trustees vs. Liddle's Assignees*, 3 Jut., 322, and *Wolf vs. Richards*, 3 H. C. 102, and other cases of the same kind. Now in the present case the deed of sale is very loosely drawn and to some extent ambiguous, because while on the one hand it provides that the engine "shall remain and be deemed the property of the sellers until the last instalment of the purchase price has been duly paid," on the other hand it goes on to stipulate that in the event of any default in the due payment of the instalments the engine "shall revert" to the sellers. These expressions undoubtedly cause a difficulty in construing this document; but on the whole we are of opinion that the use of the word "revert" is not in itself sufficient to override and deprive of their legal force and effect the strong and clear expressions which precede it, and that the intention of the parties was that the engine should remain the property of the French Company until paid for, while they were also to have the right to resume possession if the instalments were not duly paid. That being so, the case is one of a sale with a suspensive condition, and the property remained in the vendors, and is now vested in the defendant. Of course if the Gem Company as landlords had sued Smythe and Tucker and obtained payment, and the engine had been attached and sold in execution, the case would have been different; but the mere handing over of this property by Smythe and Tucker to their landlords, by private arrangement, clearly gave the latter and their assigns no greater rights than were possessed by Smythe and Tucker themselves. The case is no doubt a hard one for the plaintiffs,

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and it is unfortunate that they were not informed of the terms of the deed of sale by the French Company before the action was brought, in which case they would very likely have abstained from instituting these proceedings; but as far as the defendant is concerned he is in no way to blame, and he must have judgment with costs. I would add that as it appears that the French Company received £106 out of the £135 for which they were to sell to Messrs. Smythe and Tucker, in whose shoes the plaintiffs may be said to stand, and that they subsequently sold the same engine to Locker for £120, I think it would be right for the Company to pay the plaintiffs say £70 or £75 out of the amount they received in instalments; but as the Company is not now before the Court we cannot go beyond a mere expression of opinion to this effect.

SOLOMON and COLE, JJ., concurred.

*Lange* said that he was instructed by the representative of the Cie. Française to state that the suggestion which had been made by the Court would be complied with.

[Plaintiffs' Attorneys, CALDECOTT & BELL.  
Defendant's Attorney, D. J. HAARHOFF.]

#### L. & S. A. EXPLORATION COMPANY vs. HAYBITTEL.

*Messenger of R. M. Court.—Execution of writ.—Negligence.—*  
*Ord. 37, 1828, § 8.—Act 20, 1856, § 53, and Sched. B. § 58.*

*In an action against the Messenger of a Magistrate's Court for damages sustained owing to his negligence in executing a certain writ: Held, that there was some evidence of negligence on the part of the defendant but that, as it did not appear that the plaintiffs had sustained any damages thereby, the action must fail.*

*Where property which the Messenger was about to attach was claimed by a third party, and he thereupon reported the claim to the plaintiffs' attorney, and applied for an*

*indemnity which was not given : Held, that in the circumstances of the case he was justified in not proceeding with the attachment.*

The defendant in this case was the Messenger of the Magistrate's Court of Kimberley, and the plaintiff company sued him for £150, as damages for his neglect and failure to levy and raise the amount of a certain writ which had been delivered to him for the execution of a judgment recovered in an action between the present plaintiffs and Messrs. Smythe and Tucker. The plaintiffs alleged that there were certain goods and chattels belonging to Messrs. Smythe and Tucker within the district, of which the defendant had notice, and out of which he could and ought to have levied the said judgment debt, but had failed to do so, and made default in the execution of the said warrant whereby the plaintiffs had sustained damage. The defendant pleaded that on receipt of the said warrant he had duly attached certain goods of Messrs. Smythe and Tucker, which goods had subsequently been sold in execution, but did not realise sufficient to cover the amounts of certain prior writs under which, more than ten days previous to the attachment by the defendant, they had been duly attached by the Deputy Sheriff. Save as above, the defendant had been unable to find any goods or chattels of the said persons, nor were any pointed out to him, and he had duly made his return to that effect.

The facts of the case were shortly as follows:—On receiving the warrant the defendant had attached certain property, blue ground, &c., belonging to Smythe and Tucker, who were a firm of diggers, but of this the Deputy Sheriff was already in possession under certain High Court writs, and, an attempt to effect an arrangement between the various creditors having fallen through, the property was sold, and the proceeds were absorbed by the previous writs. The plaintiffs' attorney then asked the defendant if there was no other property, such as household furniture, and the defendant replied that he had been to the house where Smythe and Tucker lived together on a previous occasion, but the furniture had then been claimed as her separate

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property by Mrs. Tucker, in whose name it may be observed that the stand licence for the house had been taken out in the books of the Exploration Company, the present plaintiffs. The plaintiffs' attorney, having ascertained that there was no ante-nuptial contract registered between Mr. and Mrs. Tucker, then directed the defendant to attach the furniture, and he proceeded to the premises for the purpose, when the property was claimed by one Pam, who alleged that he had purchased it from Mrs. Tucker, and Pam's attorney wrote to the defendant warning him not to attach. The defendant then, as he stated, and this statement though disputed was confirmed by another witness, asked the plaintiffs' attorney for an indemnity before proceeding further, and on this being refused made a further return of *nulla bona*. Mr. Pam was called and stated that, subsequent to the issue of the warrant in question, he had purchased the house and furniture from Mrs. Tucker for £300, part of which was set-off against a debt due to himself from Tucker, while the balance was applied to the payment of arrears of rent, upon which the stand licence was transferred to Pam, and he went to live on the premises, and the furniture still remained there. Mrs. Tucker was not called, and there was no direct evidence that the furniture in question was her separate property. Messrs. Smythe and Tucker had both left Kimberley before the case was tried.

*Frames*, for the plaintiffs, as to the amount of diligence required of a Sheriff or Messenger in the execution of his duty, referred to *Thompson on Negligence*, 825; *Campbell on Negligence*, 42, 43; *Addison on Torts*, 5th ed. 628, 629; *Van der Linden*, 489; *Louw vs. Fife*, 2 Juta, 65; *Dersley vs. Wagner*, 5 E. D. C. 248; Act 20, 1856, § 53, and Sched. B., §§ 42 and 58. In the present case it was the duty of the Messenger in the first instance, knowing that there were other writs which would probably absorb the proceeds of the sale of the blue ground and plant, to have attached the household furniture as well, and, if claimed by any third party, to have reported the matter to the Magistrate, so that an interpleader might be brought. There was no proof

in this case that the property belonged to the claimant and, the defendant having returned *nulla bona*, the plaintiffs were entitled to sue for damages. He referred to *Pitcher vs. King*, 5 Q. B. at p. 766.

*Guerin*, for the defendant, said that the onus lay on the plaintiffs to prove that the property in question was liable to attachment, and contended that this had not been proved, and that Mrs. Tucker was recognised as the owner. The provisions of Act 20 of 1856 referred only to cases where property had been actually attached before the claim was made. It was provided by Ordinance 37 of 1828, § 8, that where a claim was made as in the present case the Sheriff was entitled to an indemnity from the plaintiff before proceeding, and the Messenger was in a similar position. He contended that there had been no neglect or default on the part of the defendant and referred to *Olivier vs. Keating*, Foord, 102, and *Dersley vs. Wagner*, *ubi supra*.

*Frames*, in reply :—Great doubt was expressed by the Eastern Districts Court in confirming the decision of the Magistrate in *Dersley vs. Wagner*, as appears from the report. As to the point that the property was not actually attached, that was also the case in *Louw vs. Fife*, where it was held to be the Messenger's duty to report the claim to the Magistrate.

*Cur. adv. vult.*

*Postea* (August 20),—

LAURENCE, J.P., said:—This is an action for damages alleged to have been sustained by the plaintiff company through the negligence of the defendant, the Messenger of the Magistrate's Court, in executing a certain writ or warrant handed to him by the plaintiffs' attorneys in a case in which they had recovered judgment against Messrs. Smythe and Tucker. In order that the plaintiffs should succeed they must prove not only negligence on the part of the defendant but also that they have sustained damage by reason of such negligence (see the cases of *Williams vs. Mostyn*, 4 M. & W. 145; *Wylie vs. Birch*, 4 Q. B. 566; *Lery*

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Now with regard to the duty of a Messenger I am content to follow the language of SMITH, J., in the Circuit Court case, to which I referred counsel before the present case was argued, and which it appears was adopted by the Eastern Districts Court and cited by BUCHANAN, J., in the case of *Dersley vs. Wagner*, 5 E. D. C. at p. 251. Mr. Justice SMITH observed that “it was undoubtedly the duty of the Messenger to use due diligence, and to protect the interests of the execution creditor by seizing sufficient movable property to cover judgment and costs; but the law gave the Messengers discretionary powers to exercise their own judgment, and as long as it can be proved that reasonable care and forethought had been exercised, and in the absence of *mala fides*, they should not be mulct in damages.” Applying these observations to the present case, the first question is whether the Messenger on receiving this writ on March 30 used due diligence in executing it. What he actually did was to attach certain blue ground and diggers’ plant, the property of the defendants, but he made no attempt to attach any property belonging to them which might have been found at the private residence which they jointly occupied. Now it is no doubt advisable in the first instance in the case of a partnership debt to endeavour to levy the amount of the writ out of the property of the firm before resorting to the private property of the individual partners; but in this case as the defendant was aware, either at or shortly after the time when he effected his attachment, that the property attached was already in possession of the Deputy Sheriff under prior writs, and that it was at all events doubtful whether there would be any surplus available after those writs had been satisfied, I think that, in the absence of any special reason to the contrary, the Messenger should have made some attempt to attach any other available property belonging to the defendants which he might have been able to find. The reasons which he assigns for not doing so are firstly that, not long before, he had gone to the private residence of the defendants, when the effects which were there had been

claimed by Mrs. Tucker as her separate property ; secondly, that the Deputy Sheriff had abstained from attaching or attempting to attach anything beyond the partnership property in satisfaction of his writs. But the Deputy Sheriff might have thought that he had obtained a sufficient attachment for his purpose, and moreover if he had made a mistake that would not excuse the Messenger for following his example ; while as to the other reason, even if all the goods on the premises, when he repaired there on the former occasion, had been the property of Mrs. Tucker, it did not necessarily follow that either Smythe or Tucker might not in the interval have acquired goods and brought them there, which goods, when this writ was delivered to the Messenger, might have been liable to attachment. It is true that in the case of *Dersley vs. Wagner* a Messenger omitted to attach goods with certainly no greater excuse, and on perhaps even more inadequate grounds than those which actuated the present defendant, and in that case the Eastern Districts Court with considerable hesitation refused to interfere with the decision of the Magistrate who had found the Messenger not to be liable in damages to the execution creditor ; but on the whole, looking at the facts of the present case, I am disposed to think that the defendant was not as diligent as he should have been in attempting to execute the present writ, and therefore that, if the plaintiffs can prove they have sustained any damage in consequence, they are entitled to recover. Now the evidence shews that rather more than a month after receiving the writ, and after it had been ascertained that the plaintiffs would receive no portion of the proceeds of the execution sale of the goods which had been attached, the defendant, on express instructions from the plaintiffs' attorneys, did attempt to attach the effects at the private dwelling house. On the deputy-Messenger repairing thither for the purpose, the goods were claimed by Mrs. Tucker and he was refused admittance ; he states also that she mentioned the name of Mr. Pam ; and from Mr. Pam's evidence it would appear that shortly before this, and some time after the warrant had been delivered to the defendant for execution, Pam had purchased these goods from Mrs. Tucker. Mrs. Tucker, however, was not

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called; it appears that her reported assertion that she was married under ante-nuptial contract has not been corroborated on a search in the local Deeds office; and there is nothing before the Court to shew that the furniture and other articles which have been mentioned are in fact her property. Now here it seems to me that this dilemma presents itself. When the deputy-Messenger repaired to these premises at the beginning of May these articles were just as liable to attachment, or just as exempt from attachment, as they were when he received the writ at the end of March. For either they belonged to Mrs. Tucker or they did not. In the former case they were never liable; in the latter, the sale to Pam by a person who was not the true owner was entirely nugatory and the goods were still on the premises and just as liable to attachment as before that transaction took place. The real reason why they were not at this time attached and the defendant made a *nulla bona* return was that they were claimed by a third party, Mr. Pam, whose attorney gave the Messenger notice in writing and warned him not to seize them, while the plaintiffs' attorneys refused to indemnify him if he did so. On this point I think there can be no doubt, for the defendant is corroborated by the independent evidence of Houlgrave, and Scrutton, clerk to the plaintiffs' attorney, will not swear that the defendant did not ask for an indemnity—which in the circumstances it was natural for him to do and would in fact have been surprising if he had not. We must take it then that an indemnity was asked for and, if not positively refused, at all events it was not given. Now we were referred by Mr. *Guerin* to the provisions of Sect. 8 of Ord. 37 of 1828, which enacts "that if there shall be any claim made by any other person to any such property about to be seized by the said Sheriff, or his deputy, then, if the said plaintiff, or his attorney, will indemnify the said Sheriff by an undertaking in writing, signed by the said plaintiff, to save him harmless from any loss or damage by reason of the seizure thereof, then the said Sheriff, or his deputy, shall take and seize the same, and the same shall forthwith be inventoried and taken into the custody of the said Sheriff, or his deputy." Now the position of the Messenger is the same as that of the

Sheriff, as was expressly held by the CHIEF JUSTICE in *Olivier vs. Keating*, Foord, 102; as is also shewn by that case, if he attaches and sells property which does not belong to the judgment debtor, after notice of the fact, he lays himself open to an action for damages; and I am therefore of opinion that in a case like the present the defendant was justified in declining to proceed further unless indemnified. It is true that Mr. Justice BUCHANAN observed in *Dersley vs. Wagner*:—"I do not think that, in general, Messengers ought necessarily to refuse to make an attachment merely because of the bare statement of the debtor that the property in his possession does not belong to him" (although apparently this was all the Messenger had to guide him in *Olivier vs. Keating*). He goes on to say:—"I think if the Messenger does not make an attachment of such property he should have some reasonable grounds for believing that property found with the debtor is not his, and that it is not liable to attachment. . . . If the Messenger has good grounds for being satisfied that the property is not executable, he ought, of course, not to attach it." In the present case, considering what had happened before and bearing in mind the formal claim made on behalf of Pam, and the provisions of the Ordinance of 1828, I think as already stated that the Messenger was justified in demanding an indemnity from the plaintiffs' attorneys and refusing to attach unless he received it. If therefore the plaintiffs have sustained any damage, it was not damage occasioned by the defendant's negligence and for which he is therefore responsible. Whether they have or have not in fact sustained damage is not the question before us, and we have not to determine the validity of the alleged sale to Pam. If the furniture in question really belonged to Smythe and Tucker, or to either of them, apparently it is still on the premises and still liable to attachment. One other point was taken by the plaintiffs, namely that the Messenger had neglected his duty in not reporting to the Magistrate the claim that was made. The provisions of sect. 53 of the Magistrates Court Act of 1856 and of Clause 58 of the Schedule thereto appear, however, to refer to cases where property has been claimed after being actually taken in

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execution, and where it therefore becomes necessary to try the issue by interpleader; while with regard to the case of *Louw vs. Fife*, where there was no actual attachment, and where the defendant was held not liable, it is sufficient to observe that, according to the reasons given for the judgment, apparently he would have been equally successful if he had merely reported to the plaintiffs' agent, leaving him to put the law in motion if he chose, as in the present case, and not to the Magistrate as well. On the whole I am of opinion that the plaintiffs have failed to prove that they have sustained any damage by reason of the defendant's neglect or default, and the defendant is therefore entitled to the judgment of the Court. I think it right to add that the defendant's failure to reply in writing to the letters addressed to him by the plaintiffs' attorneys, and his carelessness in mislaying those letters, as well as that received from Mr. Pam's attorney, are open to comment and not such conduct as the Court would expect from an official in his position; but there is nothing in these matters to justify us in departing from the ordinary rule that the costs must follow the result.

SOLOMON and COLE, JJ., concurred.

[Plaintiffs' Attorneys, CALDECOTT & PHEAR.  
 Defendant's Attorneys, COGHLAN & COGHLAN.]

GEDDES vs. KAISER WILHELM GOLD MINING CO.

*Joint-Stock Company.—Prospectus.—Misrepresentation.—  
 Rescission of Contract.*

*Where a plaintiff had applied for shares in a mining company on the faith of a prospectus which announced that the Company was "to be incorporated with limited liability," and about eighteen months afterwards brought an action for the rescission of his contract to take shares on the ground that the company had not been so incorporated, and it appeared that the delay in registration under the*



*Companies Act had arisen through accidental circumstances for which the Company was not to blame, and of which the plaintiff was or might have been aware, and the Company had in fact been registered before the action was tried: Held, that the plaintiff was not entitled to be relieved from his contract.*

The plaintiff in this action claimed a rescission of his contract to take shares in the defendant Company, the removal of his name from the list of shareholders and the refund of certain sums paid on application for and allotment of the said shares. The plaintiff alleged that he contracted to take these shares upon and subject to the condition that the Company should obtain a certificate of registration with limited liability under the provisions of Act 23, 1861, within a reasonable time from the date of the formation of the Company. The formation of the Company was completed in January 1887, and since then the Company had been carrying on mining and other operations, but had neglected to comply with the above-mentioned condition and was still carrying on the said operations and incurring liabilities as a joint-stock Company with unlimited liability. The plaintiff after the lapse of a reasonable time had requested the Company to carry out the said contract and obtain such certificate as aforesaid; and, on their neglecting to do so, he had repudiated the contract and declined to be bound any longer thereby, and given the Company formal notice thereof; but they had refused to remove his name from the list of shareholders or to refund the amount paid. The plaintiff annexed to his declaration a copy of the prospectus of the defendant Company, which had been formed for the purpose of acquiring certain claims at the De Kaap Gold Fields, and which announced that it was "to be incorporated with limited liability." The defendants in their plea denied that the Company was incurring liabilities; but admitted that it had not yet obtained a certificate of registration with limited liability, and said that such absence of registration was not due to any neglect on their part. Ever since its formation the Company had used every endeavour to

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procure such registration, but had hitherto been unable to obtain the requisite number of signatures of shareholders to the trust deed in due form as required by law, the majority of the shareholders being resident in various parts of the South African Republic. The Company was still taking the necessary steps for this purpose, and as soon as the said signatures arrived, and were approved by the Registrar of Deeds at Kimberley, the certificate of registration would be applied for and obtained by the defendants. At the trial the defendant Company applied for leave to amend their pleas by alleging that the certificate of registration had now been actually obtained, but this application was opposed and after argument withdrawn. The plaintiff stated in his evidence that in November 1886 he had applied for and been allotted fifty shares in the Company and that he made his application on the faith of the statements contained in the prospectus, and would not have applied had it not been stated that the Company would be incorporated with limited liability. In June 1887, on application being made for the balance due on calls, he ascertained that the Company had not been registered and wrote objecting to pay the call on that ground. Nothing further happened till May 1888, when the plaintiff, finding that the Company was still unregistered, wrote to repudiate his contract and apply for the return of the sums paid, and on this demand not being complied with—the secretary of the Company informing him that the deed was then at the Deeds Office for registration—he instituted the present proceedings. He stated that before doing so he was informed by the secretary that the Company's funds were exhausted and the property was being developed by money advanced by some of the directors. The secretary, however, explained that what he said was that as many of the shareholders had failed to pay their calls the directors had made an advance, and in fact it appeared that the amount of this loan was only about £230 while £2400 was due on calls. Since the summons was issued the plaintiff, on learning that registration had been effected, which took place on June 25, had offered to withdraw the action on payment of costs incurred, but this offer had been refused. The evidence

for the defence was to the effect that every effort had been made to obtain registration, and the deed had been handed in for that purpose and the stamps cancelled in the Deeds Office as early as January 1887; but delays had occurred owing to powers sent by shareholders in the Transvaal to sign the deed on their behalf having been twice rejected as informal, in consequence of which a new power was drawn at Kimberley and sent to the Company's representative at Barberton to get the signatures of the shareholders, who were scattered about the Transvaal, and which were sent down as received in batches, and as soon as the necessary number was obtained registration was effected without any neglect or avoidable delay on the part of the Company.

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*Guerin*, for the plaintiff, said that the case must be determined by the question whether the plaintiff was justified in repudiating when he did, *i.e.* in May 1888, irrespective of what might have happened since. It was clear that he would never have made the contract except on the terms that the Company was to be limited, and it was the duty of the Company to carry out this intention within a reasonable time, which had not been done. He referred to *Lindley on Partnership*, 4th ed. 106; *Peck vs. Derry*, 37 Ch. D. 541. When the plaintiff repudiated he had not obtained what he bargained for and was a member of an unlimited Company which had incurred debts: *Downs vs. Ship*, L. R. 3 H. L. 343; *Kennedy vs. Panama, &c. Mail Co.*, L. R. 2 Q. B. 580. It was the duty of a shareholder in a case of this kind to repudiate promptly: *Atlas D. M. Co. vs. Poole*, 1 H. C. 20.

*Lange*, for the defendants, was not called upon.

LAURENCE, J.P.:—This case has been very fairly argued on behalf of the plaintiff, but I do not think it is necessary for the Court to hear counsel on behalf of the defendant Company. The action is nominally one for the rescission of the plaintiff's contract to take shares in the Company, for the removal of his name from the register of shareholders and for the refund of the amount which he has paid for his shares. Really, however, it is an action for costs; for the

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plaintiff has admitted that after bringing the action circumstances occurred which made him offer to withdraw it, provided he was paid the costs he had incurred. This offer was refused and so we have now to decide whether the plaintiff's claim is one which can be maintained. In this case no fraud is alleged on the part of the promoters or directors of the defendant company; it is not an action for damages sustained on account of fraudulent misrepresentation, such as would give rise to what is called in English law an action of deceit, and would give the plaintiff a right to recover from the responsible parties any damages he might have sustained thereby. The plaintiff, however, alleges that there was a material misrepresentation in the prospectus, relying on which he entered into this contract to take shares, and that the representation in question operated as an inducement without which he would not have made the contract, and if he can establish this he is no doubt entitled to relief. The representation on which he bases his case is the statement that the Company was to be incorporated with limited liability, and this representation cannot be regarded as other than an important and essential element in the description or programme of the proposed Company. It must, however, be observed, as I pointed out when this case was formerly before the Court on exception, that there is a wide distinction between a representation of fact and one of intention. If anything is represented as an existing fact, the representation, if material, must be true at the time when it is made; when it is merely an announcement of what is intended to be done, that intention must be carried out in due course and within a reasonable time, subject to any accidental causes of delay which may happen to arise. Now in the present case it can scarcely be contended that it was necessary to obtain the certificate of registration under the Companies Act before the Company began its operations. It was inevitable that there should be some delay in obtaining this certificate; and if nothing had been done meanwhile the shareholders might not unreasonably have complained of this inaction, and that the capital which they had subscribed was lying idle instead of being employed in the development of the mine. The main point



which we have to consider is the reason why, although this Company was formed in January 1887, it was still unregistered so long afterwards as May 1888, when this action was commenced. Now on this point the evidence satisfies me that this long delay occurred not owing to any want either of good faith or of activity on the part of the directors, but owing to the defects in the powers to sign the trust-deed which were discovered on two occasions, to the fact that fresh powers had to be obtained from a large number of shareholders residing in various parts of the Transvaal, and partly also to certain delays in verification which took place and other formalities which had to be complied with in the Registry of Deeds. In the special circumstances of this case I do not think that registration could have been obtained earlier, or that the defendant Company can be held blameworthy for the delay, or that there has been any neglect or failure on their part to carry out the intention which they have always had to become incorporated as a limited Company. It also appears from the evidence that the plaintiff before he brought his action might have ascertained the position of affairs, and that information on the subject was tendered to him or to his attorney, and that it was explained before the action was brought that the trust-deed was then in the Registrar's office for the purpose of registration. Neither can it be held that the plaintiff was forced to rush into this action through having reasonable grounds for fearing that liabilities were being incurred by the Company for which he would become responsible beyond the amount of the calls still due on his shares; for the evidence shews that the liabilities of the Company were trifling in comparison with the large amount due from shareholders, and that it had been explained to the plaintiff that the reason why these advances from the directors had been required was simply owing to the neglect of a large number of shareholders, among whom he was one, to pay their calls. I think therefore that the defendants are entitled to our judgment, and the only point about which I have entertained any doubt is whether the offer made by the plaintiff, when he found that registration had been effected, to withdraw his action on payment of the costs

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incurred, was not an offer which in the special circumstances of the case should have been accepted by the Company. On the whole however, as these costs had been incurred owing to the plaintiff's own precipitancy in beginning his action at a time when a little more inquiry should have satisfied him that there was no sufficient ground for doing so, it cannot be held that the defendants were bound to pay them, and there must therefore be a judgment for the defendant Company with costs.

SOLOMON and COLE, JJ., concurred (a).

[Plaintiff's Attorney, PLAYFORD.  
 Defendants' Attorneys, KNIGHTS & HEARLE.]

# DALL vs. REGISTRAR OF DEEDS.

*Ante-nuptial contract.—Registration.—Act 21,  
 1875.—Ord. 11, 1872, G. W.*

*Where an ante-nuptial contract had been tendered for registration to the Registrar of Deeds at Kimberley within twenty-eight days of execution, but the registration had not been effected owing to a clerical error on the part of the notary, the Court directed registration of the contract, reserving the rights of any creditors who might have become such previous to registration.*

1888  
Aug. 9.  
 Dall vs. Registrar  
 of Deeds.

This was an application, on notice to the Registrar of Deeds, for an order for the registration of an ante-nuptial contract, which had been executed by the petitioners, husband and wife, the day before their marriage, on December 20, 1887, and had been tendered by the notary for registration at the Deeds Registry at Kimberley, on January 14, 1888, but, owing to the inadvertent omission by the notary in the copy filed of the name of the trustee, registra-

(a) This judgment was confirmed on appeal by the Supreme Court on Nov. 27. See 6 Juta, 263.

tion had not been effected. The application was supported by affidavits by the petitioners and the notary to the effect that the omission had not been pointed out to the latter till after the time allowed by law for registration, that it had since been rectified and that it was not attributable to any fraud or neglect on the part of the petitioners.

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*Guerin*, for the petitioners, referred to Ord. 11 of 1872, G.-W., and Ord. 27 of 1846. The contract had been tendered for registration within the twenty-eight days (a).

LAURENCE, J.P., referred to *Schoombie vs. Schoombie's Trustees*, 5 Juta, 189, and cases there cited, and said that in the circumstances as set forth the Court would direct registration of the contract, reserving the rights of any creditors who might have become such previous to the registration.

[Petitioner's Attorney, SCHERMBRUCKER.]

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### HAUPT vs. DIEBEL BROTHERS.

*Master and servant.—Wrongful dismissal.—Justification.—Measure of Damages.*

*H. sued D., a tradesman by whom he had been employed, for wrongful dismissal. D. justified on the ground that H. had assaulted a fellow-servant and created a disturbance on his business premises: Held, on the facts, that the assault, which was to some extent provoked, and the consequent disturbance, which was not proved to have in any way injured D. in his business, did not afford sufficient justification for summary dismissal, and that H. was therefore entitled to damages equivalent to a month's salary in lieu of notice.*

*Where the period over which the contract of service extended was still unexpired when the action for wrongful dismissal*

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(a) Cf. Act 21, 1875, § 17.

*was tried, the Court gave as damages the amount of unpaid salary for the whole period in the absence of any evidence that the plaintiff could or was likely to obtain other employment for any portion of the period in question.*

1888.  
Aug. 9.  
" 10.  
Haupt vs.  
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The plaintiff in this action sued the defendants, a firm of butchers at Kimberley, by whom he had been employed, for wrongful dismissal. The defendants justified the dismissal on the ground that "on July 16, 1888, the plaintiff was guilty of gross misconduct on their business premises and during business hours by there and then creating a disturbance and abusing and seriously assaulting another of their servants in the presence of their customers and interfering with the transaction of business and by refusing to desist when ordered by the defendants so to do, whereupon and in consequence of such misconduct on his part the defendants dismissed the plaintiff from their services as they were by law entitled to do," paying him the full amount of wages then due to him. The plaintiff in his replication admitted the assault but said that it was committed under gross provocation. From the evidence it appeared that the plaintiff was employed as a "blockman" in the defendants' shop, where he served customers and was responsible for meat so supplied. The defendants had another servant named Diefenbach, who was in the habit of taking meat for consumption by his family, under an arrangement with the defendants, it being understood that meat so taken was to be duly entered in the books. It appeared that previous to this affair the plaintiff and Diefenbach had not been on very good terms. On the morning of the dismissal, the plaintiff asked Diefenbach why he had not put down the meat he had taken for the last two days, and it was admitted that in putting this question he was not exceeding his duty. Diefenbach, against whose honesty it should be stated that no imputation was made at the trial, replied vaguely that the meat had been entered. The plaintiff then looked at the books but found no entry, and it subsequently appeared that a rough entry had been made by the book-keeper, who was absent at the time, at the back of one

of the books and at a place where it might naturally have escaped the plaintiff's notice. The plaintiff then returned from the shop to a back-room, where Diefenbach was having his breakfast, and said he could find no entry, and if Diefenbach took meat without putting it down he should consider that he meant to steal it, or words to that effect. Diefenbach thereupon called him a liar, using an offensive expletive, and the plaintiff by way of retort struck him a rather violent blow on the face. Diefenbach began to scream, and the plaintiff held him down in his chair, and a disturbance ensued which lasted some minutes until the defendants, who were in the backyard, at some little distance, came up and separated their servants. It appeared that the attention of the neighbours was attracted by the row, and some people ran into the defendants' yard and into that adjoining to see what was going on, but it was not satisfactorily proved that there were any customers in the shop or that the business of the defendants was interfered with or in any way suffered in consequence of the disturbance. The defendants were naturally annoyed, and told both the plaintiff and Diefenbach that they would have to leave at once. In the end, however, Diefenbach was allowed to remain and the plaintiff was dismissed, being paid his wages to date, and a subsequent tender of his services was made and refused.

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" 10.  
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*Frames*, for the plaintiff, contended on the facts that the plea of justification had not been proved. The plaintiff was only doing his duty in making the observations and inquiries which led to the assault, and no evidence had been called except that of the defendants and their servants as to the disturbance having attracted attention, while the plaintiff had called two independent witnesses to prove the contrary. As to what justified summary dismissal, he referred to *Callo vs. Brouncker*, 4 C. & P. 518, and the observations of SMITH, J., in *Bassaramadoo vs. Morris*, 6 Jut, 28.

*Guerin, contra*, contended that the assault committed by the plaintiff was unjustifiable and warranted his dismissal. The defendants might have acted somewhat hastily at the

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time, as was natural in the circumstances, but could rely on the facts as now proved. He referred to *Ridgeway vs. Hungerford Market Co.*, 3 A. & E. 171.

LAURENCE, J.P.:—This is an action for wrongful dismissal and the question which we have to decide is whether the defendants have succeeded in establishing their plea of justification. The facts of the case are of no particular interest except to the parties immediately concerned and the dismissal took place in consequence of what I can only describe as a squalid squabble between the plaintiff and a fellow-servant. Now in the first place it is to be observed that the defendants acted in this matter with considerable precipitancy, and when they dismissed the plaintiff they certainly were not aware whether they were or were not justified in doing so. All they knew was that this disturbance had taken place and they admit that they dismissed the plaintiff without making any inquiry into its cause, and it might well have been that the plaintiff was entirely free from blame in the matter, in which case it would of course have been impossible to justify the dismissal. It has, however, been decided that, differing in this respect from actions of malicious prosecution, where the question of malice or not necessarily depends upon what was in the mind and within the knowledge of the defendant at the time the prosecution was instituted, in actions for wrongful dismissal, as in actions for defamation of character, a plea of justification can be supported on facts which were in existence at the time of the occurrence, although only subsequently ascertained by the defendant; see *Kenrick vs. Central D. M. Co.*, 3 H. C. at p. 419, and *Rojesky vs. Ross*, 4 H. C. at p. 133, and cases there cited. This being so, it becomes necessary to express an opinion as to the circumstances and particulars of this quarrel, and I can only repeat what I said during the argument, namely that both parties were to some extent to blame. The plaintiff in my opinion was quite justified in the first steps he took but he had not sufficient evidence before him to charge Diefenbach with theft, as he practically did, and no doubt this hasty and unfounded charge to a great extent excused Diefenbach's offensive



rejoinder. When a man is called a liar, however, especially when the substantive is combined with the offensive expletive which Diefenbach does not deny that he may have used, it is scarcely surprising, and only in accordance with human nature, that he should retaliate with a blow, as indeed was held by the Supreme Court in the case of *Saget vs. Bataillon*, Buch. 1868, 32. There is a story of a man who once called another a liar and received a kick in return, whereupon he brought an action for assault. The defendant's counsel, on the facts being proved, briefly addressed the jury as follows:—"I am sure, gentlemen, in this case your common sense will shew you what to do; an insult, a kick, a farthing, all the world over!" The jury accordingly returned a verdict for the plaintiff, with a farthing damages, whereupon his counsel observed "My client has got more kicks than half-pence." Well, in regard to the circumstances of the present case, I can only repeat that the quarrel was one in which both parties were to blame; and although it might have afforded very good grounds for the defendants determining to promptly get rid of one or both the parties, and paying a month's wages in lieu of notice, on the whole I am not prepared to hold that it warranted the summary dismissal of which the plaintiff complains. I think that when he tendered his services the defendants, having had time for investigation and reflection, should at all events have given him a month's notice and allowed him to serve for that period or else have paid him a month's wages in lieu thereof. If indeed the evidence had shewn for instance that the plaintiff was a man of intemperate habits and had got drunk and wantonly assaulted his fellow-servant, the case would have been different; or if it had appeared that he had committed an unprovoked assault in the defendants' shop, in business hours, to the interruption of their business and the scandal and disgust of their customers. But the facts in this case are quite otherwise; the assault was committed in a private room, and no evidence has been called to shew that any of the customers of the defendants saw or heard anything of it, or that the defendants in fact suffered any damage in their business or reputation in consequence of what took place, and I am

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therefore of opinion that the plea has not been made out. Now with regard to damages the plaintiff's counsel in opening the case admitted in reply to the Court that he could not claim more than one month's wages and allowances from the date of dismissal, in lieu of notice, the plaintiff having been paid monthly, and this would amount to the sum of £26. Some difficulty however with regard to the assessment of damages has arisen owing to the extreme promptitude with which this action has been brought and tried. The dismissal took place on July 16, the summons was served on July 21, and we are now giving judgment on August 10—within a month of the dismissal. It was, however, held by this Court in the case of *Donaldson vs. Webber*, 4 H. C. 403, that it was not necessary for a servant who had been wrongfully dismissed to await the expiration of the period for which he had been hired before instituting proceedings. The principle to be applied is that, if the servant during the period in question has succeeded in obtaining remunerative employment elsewhere, the Court will deduct the remuneration actually received from the damages which would otherwise have been awarded. This has been held in the cases of *Hunt vs. Eastern Province Boating Co.*, 3 E. D. C. 12; *Denny vs. S. A. Loan, &c. Co.*, *ib.* 47; *Douglas vs. L. & S. A. Expl. Co.*, 4 H. C. 275. Where, however, the period has not expired when the action is brought, the Court would I think be justified, as laid down by Willes, J., in *Hartland vs. General Exchange Bank*, 14 L. T. N. S., cited in *Donaldson vs. Webber*, in taking into account the probabilities of the plaintiff obtaining other employment during the unexpired portion of the time over which his contract of service extended. In the present case, the evidence is that the plaintiff has done his best, but up to the present without success, to obtain other employment; we are within a week of the 16th August; and as there is no reason to assume that during this week the plaintiff will succeed in getting any engagement, I think it will be right to award him damages equivalent to a month's salary, adopting the same measure of damages as was taken by the Eastern Districts Court in the above-mentioned case of *Hunt vs. E. P. Boating Co.*, in which case also the action

was brought before the period had expired for which the plaintiff had been engaged. Judgment will therefore be for the plaintiff for £26 and costs.

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SOLOMON, J.:—I concur. With regard to the details of the dispute which led to this action, I quite agree with what has been said by the Judge President. I think it was only natural that in the annoyance caused by the disturbance the defendants should have in the first instance determined to get rid of servants who conducted themselves in such a manner, but on re-consideration they should have seen that the case was one in which the proper course would be to give a month's notice or, if they feared the renewal of similar disputes and consequent injury to their business, to pay a month's wages instead of notice. I may observe that the disturbance which actually took place seems to have been mainly attributable not to the conduct of the plaintiff but to the shouting and screaming of Diefenbach, when he received the blow which he had undoubtedly to some extent provoked. I cannot hold that on account of this isolated occurrence the defendants were justified in summarily dismissing the plaintiff, a servant who as appears from the evidence had been in their employ for a period of no less than three years and against whom they admit that they had no previous or other ground of complaint.

COLE, J., concurred.

[Plaintiff's Attorneys, GRAHAM, VIGNE & MALLETT.]  
[Defendants' Attorney, D. J. HAARHOFF.]

## BECKER vs. DUARTE.

*Magistrate's Judgment.—Attachment of immovable property.—Rule of Court 36.*

*Where it is sought to obtain an order for the attachment of the immovable property of a defendant against whom the plaintiff has obtained judgment in the Magistrate's Court and the messenger has made a return of nulla bona, it is necessary first to obtain provisional sentence on the judgment of the Magistrate's Court.*

1888,  
Aug. 10.  
Becker vs.  
Duarte.

This was an application for the attachment of certain immovable property of the respondent in satisfaction of a judgment of the Magistrate's Court, upon which a writ of execution had been issued out of that Court and a return of *nulla bona* made.

*Guerin* for the applicant.

*Joubert* for the respondent.

LAURENCE, J.P., referred to *Sheasby vs. Ross*, 4 H. C. 339, and the case there cited of *De Vos vs. Voersee*, 3 Juta, 79. Since the attention of this Court had been directed to the latter case, the practice had been, before entertaining applications of this kind, to require them to be founded on a provisional sentence to be obtained in this Court on the judgment of the Magistrate's Court. As this had not been done in the present case, the application must be refused with costs.

SOLOMON and COLE, JJ., concurred.

[Applicant's Attorney, BADNALL.]  
[Respondent's Attorney, DE KOCK.]

original case  
is lost 32/1917

*J. De Wet v. Rieba 18/10.*

SMITH AND WARREN *vs.* HARRIS.

*Contract of sale.—Measure of damages.—Specific performance.  
—Exception.*

*In an action for the price of certain shares purchased by the defendant, and of which the plaintiff tendered delivery, the defendant admitted the breach of contract and pleaded a tender of the difference between the contract price and the price at the time of the breach: Held, on exception, that the plea was bad and that the vendor was entitled to claim the purchase price in full against delivery of the shares.*

The plaintiffs in this action sued the defendant for £760 as the purchase price of certain shares in a gold mining company, which they alleged the defendant had refused to accept or pay for, and of which they tendered delivery upon payment. The defendant admitted the contract and its breach, but pleaded "that it was the duty of the plaintiffs to have sold the said shares at ruling market rates immediately or within a reasonable time after the defendant's failure to perform the said contract, as they might have done, and that had they done so the loss accruing to them through the defendant's said failure would not have exceeded the sum of £85," and proceeded to plead a tender of this sum with costs to date. The plaintiffs excepted to this plea as bad in law and the case now came on for argument on the exception.

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*Frames*, in support of the exception, admitted that the difference between the contract price and the market price at the time of the breach would be the measure of damages by English law, but contended that, according to the colonial law, the vendor was entitled to insist on performance of the contract. He relied on the observations of the CHIEF JUSTICE in *Stewart vs. Ryall*, 5 Juta, at p. 157. He contended that the English law was often unfair on the vendor owing to the difficulty in proving damage. As to the Roman-Dutch law he referred to *Hunter's Roman Law*,



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330, 331; *Mackeldeii Syst.* § 371; *Pothier on Sale*, § 278; *Domat*, i. ii. iii. 9, 10; *Grotius*, iii. 15, 1; *Van der Linden*, i. 15, 9; *Merlin*, Rép. s.v. 'Vente,' p. 344. [SOLOMON, J., referred to *Voet*, 19. 1. 14.]

*Lange*, for the defendant, submitted that if a plaintiff could be sufficiently compensated by pecuniary damages the Court would give the defendant that alternative, especially in such matters as share transactions. He referred to *Burge's Comm.* ii. 542 *et seqq.* and authorities there cited; *Pothier*, § 68; *Van Leeuwen*, tr. Kotzè, ii. 141, 142, and note.

*Frames* replied.

*Cur. adv. vult.*

*Postea* (Sept. 10),—

LAURENCE, J.P., said :—This is an action for the sum of £760 13s. 9d. as the purchase price of certain shares sold by the plaintiffs to the defendant, together with certain charges for exchange and brokerage. The plaintiffs tender transfer of the shares upon payment of the price. The defendant admits the contract to buy and his failure to perform it, but pleads that on such failure it was the duty of the plaintiffs to sell the shares at ruling market rates, in which event he alleges that the damage sustained by reason of his breach of contract would not have exceeded £85 and he pleads a tender of this sum with costs to date. Before replying the plaintiffs excepted to this plea as bad in law, and submitted that no duty was cast upon them to realise the shares as alleged in the plea, and, after hearing the arguments on this exception on provisional day, the Court reserved judgment. As the Court pointed out during the argument, the plea as worded is obviously open to exception, for there certainly was no obligation on the plaintiffs to sell the shares at the market price as alleged therein, although such a course is frequently adopted as furnishing a convenient proof of the damage sustained; but clearly the defence which it was intended to raise in the present case is that the plaintiffs' claim, in a case of breach of contract of

this kind, must be confined to the difference between the contract price and the market price, however ascertained, at the time of the breach. The plaintiffs on the other hand contend that they are entitled under our law to enforce payment of the purchase price against delivery of the articles sold. This is the real question between the parties, and although, after hearing the authorities which were cited, there did not seem to be much room for doubt on the question, at the same time we thought the matter of sufficient importance to make it advisable to deliver a considered judgment. Now, during the hearing of at least one of the numerous cases arising out of transactions in shares which have recently been before the Court, I took occasion to point out that it might be a question whether in such cases a vendor was not entitled to insist upon performance of the contract, and I specially drew attention to the observations of the Chief Justice in the case of *Stewart vs. Ryall*, upon which the learned counsel for the plaintiffs strongly relied in the present case. However, in that as in other cases, I think I am right in saying that the plaintiff confined his claim, as he was clearly entitled to do, to the damages he had sustained through the fluctuation of the share market, and it was therefore unnecessary to consider or apply the *obiter dictum* in *Stewart vs. Ryall*. Now, however, that the question is directly raised we have to look into the law on the subject. Unfortunately we are not assisted by any reference to "the writers and cases" to whom the Chief Justice alluded in general terms; it is possible that they may include some which are not to be found in the somewhat meagre collection in the Library of the High Court; but I think it probable that the authorities which were cited by counsel during the argument were substantially the same as those the Chief Justice had in view. Before dealing with them I may say a word with regard to the English law on the subject, the reference to which in the judgment of the Chief Justice in *Stewart vs. Ryall* possibly requires a certain amount of qualification. Apparently, even according to the English law, if the contract of sale is of such a nature and in such a form as to pass the property—and I need scarcely point out that under

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English law a simple contract of sale will in certain cases pass the property where, according to our law, in the absence of delivery and payment, no such result would ensue—"the vendor may at his option," as Mr. Mayne puts it, in the event of the purchaser refusing to accept the goods, "consider the contract of sale as still unbroken and recover his entire price in an action for goods bargained and sold, even though they have not been delivered." (*Mayne on Damages*, 3rd ed., 145; *Graham vs. Jackson*, 14 East, 498.) But in cases where the property has not passed, and the purchaser breaks the contract, the vendor has only an action for damages for the breach, calculated on the basis already mentioned. Such being the state of the English law, an examination of the authorities cited in the present case has satisfied me that the civil and the Roman-Dutch law so far differ from it as to entitle a vendor in all cases, whether the property has passed or not, provided he has made a valid tender of the goods sold, to maintain, if he thinks fit, an action for the purchase money, together with any interest which may have accrued due, against delivery of the subject matter of the contract of sale. The case of an action by a vendor for the purchase price differs materially from that of an action by a purchaser for delivery of the thing sold. In the former case the obligation is *ad solvendum* and there can be no reason, so to speak, in law or equity why it should not be enforced; in the latter the obligation is regarded as being *ad factum præstandum* and, although the matter has been much controverted, it was clearly the opinion of Voet, as shewn in his elaborate discussion of the subject referred to by my brother SOLOMON, that in many cases to insist upon specific performance would be impracticable or unreasonable, and the purchaser should be confined to a claim *in id quod interest*. However, all that we need decide on this occasion is that when a man has agreed to buy a given article for a given sum the law, if the vendor insists on it, will hold him to his bargain. This decision may possibly have the effect of discouraging a certain class of speculative transactions, or in other words of gambling in shares, which persons buy without any intention of holding, but simply in the hope of re-selling at a

profit; but if such is the result I do not know that it need be matter for regret. The exception must be allowed with costs.

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SOLOMON and COLE, JJ., concurred.

[Plaintiffs' Attorneys, CALDECOTT & PHEAR  
Defendant's Attorneys, COGHILAN & COGHILAN.]

### MITCHELL & CO. *vs.* PURDEY.

*Provisional sentence.—Jurisdiction.—Practice.—Pactum de non petendo.*

*M. & Co. sued P. in the Magistrate's Court on a dishonoured cheque. P. pleaded an agreement to give time for payment made with M., an absent member of the plaintiff firm. After the pleadings had closed, the Magistrate postponed the hearing in order to obtain the evidence of M. The plaintiff's then, without notice to the defendant, withdrew the case and applied to the High Court for provisional sentence. P. objected that the Court had no jurisdiction, the plaintiff having elected another forum where issue had been joined, and also raised the same defence as in the Magistrate's Court. The Court, without ruling on the preliminary objection, held that the defendant's allegations, in the absence of contradiction by M., were sufficient to justify the refusal of provisional sentence, but by consent of parties granted final judgment for the amount claimed, execution to be stayed till the expiration of the period for which the defendant pleaded that time had been given.*

This was an application for provisional sentence upon a dishonoured cheque drawn by the defendant in favour of the plaintiff firm. It appeared that an action had been brought upon the same cheque in the Magistrate's Court, when the defendant pleaded that time had been given him till the end of September by Mitchell, a partner in the plaintiff firm, who had subsequently left for England. The pleadings

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having been closed, on the case coming on for trial the Magistrate postponed the hearing *sine die* for the evidence of Mitchell. The plaintiffs thereupon withdrew the case and instituted the present proceedings. The defendant filed an affidavit to the effect that he had explained to Mitchell his inability to pay in cash, and asked for time to realise certain shares which were then unmarketable, and that Mitchell had then agreed to give him time till the end of September. Mr. Nettleton, a partner of Mitchell's, denied this agreement and alleged that Mitchell, before leaving for England, had given special instructions to sue the defendant. A replying affidavit by the defendant was tendered, to which the plaintiff objected, and

LAURENCE, J.P., said that the affidavit could not be admitted and, on the point of practice, referred to *Bank of Africa vs. Wood Bros.*, 4 Juta, 334.

*Joubert*, for the defendant, then took the preliminary objection that the plaintiff was not entitled to withdraw the case in the Magistrate's Court without the defendant's consent after *litis contestatio*, or issue joined, and then bring the same case in another Court of concurrent jurisdiction. He referred to *Van Leeuwen's Comm.*, tr. Kotzé, 2, 368; *Peckius on Arrests*, tr. Van Leeuwen, 48. 4, note; *Voet*, ii. 1. 23, 24, 26; *Sande*, Dec. Fris. 1. 7. 1; *Merula*, iv. 42. 5, 8. He further contended that the defendant, having been given time till the end of September, could not be sued before that date.

*Guerin, contra*, said that the plaintiff's right to choose his forum was clearly recognised. In English practice, before the Judicature Acts, the right of "discontinuance" was also well established, although it had been limited by Order 23 under the Act of 1875; *Grijith's Judicature Act*, 2nd ed. 279; *Canot vs. Morgan*, 1 Ch. D. 1. As to the second point, one partner could not release a partnership debt, and it might be questioned whether he could give time; he contended, moreover, that the evidence negatived the probability of the alleged promise and that in any case it was void as being without consideration; he



referred to *Tradesmen's Benefit Society vs. Du Preez*, 5  
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LAURENCE, J.P., said that there were elements of consideration for the agreement to give time, as set up by the defendant, as a forced realisation of his assets, when the cause of action arose, might have been against the interest of the plaintiffs. Moreover, independent of consideration, the agreement would afford a good ground of defence, on which point it was sufficient to refer to the observations of the CHIEF JUSTICE in *Malan and Van der Merwe vs. Secretan, Boon & Co.*, Foord's Repp. at pp. 100, 101, and the authorities there cited. As the defendant's allegations were not at present contradicted by Mitchell, there was sufficient ground for refusing provisional sentence without deciding the preliminary objection which had been raised to the jurisdiction of the Court; but, as the defendant admitted that he was liable to pay on Sept. 30, he suggested that the better course would be for him to consent to judgment for the amount claimed, execution to be stayed till that date, the plaintiffs to pay the costs, which would be set off against the amount of the judgment.

Counsel for both parties assented to this course, and

The COURT gave judgment accordingly.

[Plaintiffs' Attorneys, PLAYFORD & FITZPATRICK.]  
[Defendant's Attorney, SCHERMBRUCKER.]

JACOBS AND ANOTHER vs. VORSTER.

*Land Court.—Title.—Rectification.—Exemption.—Ord. 13,*  
1876, G. W.

A. and B. had a dispute as to the boundaries of their farms.  
B. obtained a judgment of the Griqualand West Land  
Court allowing his claim to his farm subject to the future  
settlement of the boundary line. Subsequently title was

*issued to him by the Colonial Government with a diagram annexed, including the ground in dispute within his boundary. A. brought an action in which he claimed this ground and prayed for a declaration of rights and amendment of titles and diagrams. An exception to this declaration, on the ground that it disclosed no cause of action, was overruled with costs.*

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The plaintiffs and the defendant in this action were neighbouring farmers and according to the declaration in the year 1876, and for a considerable time previously, there had existed a dispute as to the boundary line of their respective farms. In that year they filed their claims to these farms with the Land Court of Griqualand West, and by the judgment of that Court, a copy of which was annexed to the declaration, the claim of the defendant for title to his farm was allowed "subject to the future settlement of the boundary line between his farm and" that of the plaintiffs. Subsequently, in Sept. 1885, title to the plaintiffs' farm was issued in their favour by the Colonial Government, but this title had not been taken up by them. On the diagram annexed thereto the ground in dispute between the parties was marked with the word "Dispute." Previously to this, in Sept. 1880, the defendant had obtained title to his farm from the Administrator of Griqualand West, and the diagram annexed to this title included the disputed ground within the boundaries thereof. The plaintiffs alleged that the dispute had never been settled, but they had been for many years in undisturbed possession and occupation of the ground in question and which they claimed as forming portion of their farm. Since 1880, however, the defendant had given them notice to quit and threatened to disturb them in their peaceful occupation of the same. The plaintiffs claimed a declaration of rights in accordance with their contention and an order for the amendment of the titles and diagrams of the said farms. To this declaration the defendant before pleading excepted on the ground that it disclosed no cause of action, "inasmuch as it appears therefrom that title to the land thereby alleged to be in dispute has been duly issued to and accepted by the defen-

dant, and that the said boundary line is by the said title duly settled and defined, and inasmuch as the said declaration nowhere alleges or shews any grounds by law entitling the plaintiffs to have the said title in any way amended or altered, or in any way entitling them to the relief claimed." The case now came on for argument on the exception.

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*Guerin* (with him *Joubert*), for the defendant, referred to Ord. 13, 1876, G. W., §§ 2 and 3, by which it was provided that the judgments of the Land Court, if not appealed against within a certain period, should become absolute, and the person in whose favour such judgment was pronounced should become entitled to an indefeasible title to the land adjudicated on. He contended that by the granting to the defendant of title to the land in question by the Colonial Government the question of the boundary must be taken to have been determined, and the validity of that title could not now be impeached except on the grounds of mistake or fraud, which were not alleged in the declaration; he referred to *Richards vs. Nash*, 1 Juta, 312.

*Lange* (with him *Frames*), for the plaintiffs, was not called upon.

LAURENCE, J.P.:—At the present stage of this case I think it sufficient to state my opinion that the defendant has failed to shew that the declaration discloses no cause of action. The judgment of the Land Court, on which he relies, is expressly stated to have been granted "subject to the future settlement of the boundary line between" the two farms, and it must be taken, in the absence of evidence to the contrary, to have become absolute subject to this condition. Then the subsequent issue to the defendant by the Colonial Government of a title, the diagram annexed to which included in his farm the disputed ground, cannot be held in itself to have amounted to a settlement of the dispute; for it appears from the declaration that the plaintiffs never acquiesced in this grant and still claim the ground in question as forming portion of their farm. I think, therefore, that the declaration does on the face of it

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disclose a cause of action and the exception must be over-ruled, with costs.

SOLOMON and COLE, JJ., concurred (a).

[ Plaintiffs' Attorneys, COGHILAN & COGHILAN. ]  
[ Defendant's Attorney, D. J. HAARHOFF. ]

McLAREN vs. CONSOLIDATED D. M. Co., BULTFONTEIN.

*Tramway.—Level crossing.—Negligence.—Contributory negligence.*

*M., a cab-driver, met with an accident while crossing a tramway belonging to a mining company and leading from the mine to their depositing floors. It appeared that he was driving along the road in a direction in which the view of the tramway was obstructed by houses. Just as he approached a level crossing, an engine came up and a collision became imminent but was narrowly avoided. The horses he was driving, however, became restive and he was thrown out and hurt. There was no signalman at the crossing and the driver of the engine neither whistled nor slackened speed on approaching it: Held, on these facts, that the accident was caused by the negligence of the defendant company, and that contributory negligence on the part of M. was not established.*

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This was an action for damages sustained by the plaintiff owing to the negligence of the defendant company. The plaintiff was a cab-driver at Beaconsfield, and on June 30, while driving his cab along a thoroughfare in Bultfontein, was obliged to cross a certain tram-line belonging to the defendants. While so driving, as he alleged, a locomotive engine in charge of the defendants' servants was negligently and carelessly driven along the tram-line and across the

(a) The case came on for trial in the same term, and after a long hearing, involving no points of legal interest or importance, the Court, on Oct. 25, held that the plaintiffs had established their claim and gave judgment in their favour as prayed, with costs.

road at a rapid and dangerous pace, and the plaintiff, while endeavouring to avoid a collision, was thrown out of his cab and run over by it, thereby sustaining serious injuries, which confined him to his bed for three weeks and prevented him from attending to his business, and put him to expense for medical attendance and caused him much pain, loss and inconvenience, for which he claimed £101 10s. as damages. The defendants denied that the engine was driven negligently or at a rapid and dangerous pace, or that the plaintiff had sustained damage to the extent alleged. They further pleaded that the plaintiff could, by the exercise of ordinary care and discretion, have avoided the accident and that he contributed to it by his own negligence. The plaintiff joined issue.

The evidence for the plaintiff was to the effect that he was driving two passengers, natives (whose evidence neither side was able to obtain), in his cart when the accident happened. Owing to the view being obstructed by houses on the side of the road he did not see the engine, which was approaching with empty trucks from the direction of the Company's depositing floor, till he was within three or four yards of the crossing. The engine was then about fifteen yards off and approaching at a speed of twelve or fourteen miles an hour, or more than double that at which the plaintiff stated he himself was driving. There was no signal or whistle, and it was impossible to see up the line till within about ten yards of the crossing. The plaintiff pulled up his horses as quickly as possible and the engine passed by their heads, when they swerved and he was thrown out, having the reins in his hand; the wheel of the cart passed over his thigh and the horses bolted with the cart. Plaintiff was confined to his bed for some time and was unable to carry on his business, and was not thoroughly well again for over a month. (Medical evidence was called on both sides as to the injuries, which were not of a very severe character.) A shop-keeper named Johnson, who was standing at the door of his house about forty yards off, and who saw the plaintiff pass as he approached the crossing, corroborated his evidence on the main features of the case. The principal evidence for the defence was that of the

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engine-driver, Willis, and a boy named Zeiss who was with him on the engine. It was to the effect that the accident was due to the plaintiff's own carelessness; that before passing Johnson's shop there was a gap in the row of houses through which he might have seen the approaching train, and that he did in fact appear to see it when about twenty yards from the crossing and pulled in his horses, but proceeded to let them out again and attempted to get across before the train passed. The engine was going at a very moderate speed, which the driver slackened by putting on the brakes and shutting off steam as soon as he saw there was any danger. The plaintiff turned his horses when they were just on the line and the engine ran past them, whereupon the plaintiff, apparently fearing that the engine would strike the cart, got out, and, the horses being frightened and veering round, he stumbled and fell and so got injured. Other points of detail, so far as material, are sufficiently set forth in the judgment of the Court.

*Feltham*, for the plaintiff, argued on the facts that no negligence had been proved on the part of the plaintiff and that the defendants were responsible for the accident. The engine-driver should have whistled before approaching the crossing or slackened speed, or a flag or other method of warning persons approaching should have been employed. He referred to *Packman vs. Gibson Bros.*, 4 H. C. at p. 419; *Pollock on Torts*, 386; *Hume vs. Cradock Divisional Council*, 1 E. D. C. at p. 116.

*Frames*, for the defendants, referred to *Thompson on Negligence*, 1. 424 *et seqq.* on "duties of travellers with respect to crossings;" *Dublin, Wicklow and Wexford Ry. Co. vs. Slattery*, 3 A. C. 1155; *Davey vs. L. & S. W. Ry. Co.*, 11 Q. B. D. 213 and 12 Q. B. D. [C. A.] 70; *Stabley vs. L. & N. W. Ry. Co.*, L. R. 1 Exch. 13. He contended that the plaintiff on his own shewing was grossly negligent, and ought to have seen the engine when about eighteen yards off and to have been able to pull up, at the pace he was going, in three or four yards, while no negligence whatever had been proved on the part of the defendants.

*Feltham*, in reply, referred to the observations of Brett,

M.R., in *Davey vs. L. & S. W. Ry. Co.*, *ubi supra*, at p. 72; *Cliff vs. Midland Ry. Co.*, L. R. 5 Q. B. 258.

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LAURENCE, J.P., said that the Court desired to inspect the scene of the accident and judgment would therefore be reserved.

*Postea* (Sept. 25),—

LAURENCE, J.P., said:—The plaintiff in this action is a cab-driver at Beaconsfield who, on the 30th June last, met with an accident while driving his cab along a road at Bultfontein and crossing a tramway belonging to the defendant company. As he was about to cross the tramway a train, consisting of an engine with a number of empty trucks, came up and, according to the plaintiff's version, while pulling up and turning his horses in order to avoid a collision which would have been otherwise inevitable, he was thrown out of his cart and sustained the injuries of which he complains. The question is whether for this accident he is entitled to recover damages from the defendants. In order to succeed he must shew that this accident was caused by negligence on the part of the defendants and also that there was no contributory negligence on his part, without which the accident would not have happened, and the effects of which the defendants by the exercise of due diligence were unable to avoid (see *Cowell vs. Friedman & Co.*, 5 H. C. at pp. 32–34). The position may perhaps be put with more strict correctness by saying that, if the plaintiff succeeds in proving negligence, it is then for the defendants to prove such contributory negligence as above defined. First then has negligence been proved on the part of the defendants? This is a question the answer to which may perhaps be said to depend on the degree of diligence which, in circumstances such as those proved to exist in the present case, the defendant company were legally bound to exercise. Now I will not enter into any elaborate analysis of the legal theory of negligence or of the various degrees or qualities of *culpa* for which parties in various circumstances are held responsible. The subject has often been

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discussed in reported cases in this and the other Colonial Courts, and particularly, with much learning and research, in the elaborate judgment of SHIPPARD, J., in the case of *Hume vs. Cradock Divisional Council*, 1 E. D. C. at pp. 121-127. In *Thompson's* work on negligence, in the passage referred to at the bar, where a large number of American cases with reference to the "duties of travellers with respect to crossings" are collated and discussed, it is laid down in general terms that "it is the duty of each party to use such a reasonable degree of foresight, skill, capacity and actual care and diligence, as to enable each to use the privilege of crossing." For my own part, I adhere to what I said in the cases of *Solomon vs. Dutoitspan Mining Co.* (1 H. C. at p. 12) and *Austin Bros. vs. Standard D. M. Co.* (*ibid.* at p. 389), namely, that when parties, as in the present case, construct a tram-line of this kind for their own convenience, and apparently with no statutory authority, they are bound, both in making and in using it, to shew *exactor diligentia* or, according to the expression of the English lawyers, "more than ordinary care." And the applicability of this doctrine to a case like the present is expressly affirmed by *Smith on Negligence*, where he lays down, at p. 80, in reference to "the conduct of railway companies with respect to level crossings" that "apart from their statutable duty they are by running trains upon a level crossing using their property in a manner likely to cause danger, and it is their duty to exercise something more than ordinary care." As to the measure and manner in which this care must be displayed, it must necessarily largely depend on the facts of each particular case. There are a very large number of reported cases on the subject, both English and American, but for the present purpose it will be quite sufficient to quote the propositions laid down in one or two of them. Thus in the case of *Stubley vs. L. & N. W. Ry. Co.*, L. R. 1 Ex. 13, it was held that "there is no general duty on railway companies to place watchmen at public footways crossing the railway on a level; but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company." Then in *Cliff vs. Midland Ry. Co.*, L. R. 5 Q. B.

258, Mellor, J., said :—"In crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway." These observations, made with reference to a footway, would obviously apply with still greater force to crossings which serve not only as a footway but as a carriage way as well. Then there were the observations of the present Master of the Rolls, referred to by Mr. *Feltham*, in the case of *Darey vs. L. & S. W. Ry. Co.*, 12 Q. B. D. at pp. 71, 72, where he says :—"The train was approaching a level crossing where foot passengers were in the habit of crossing, and near to that level foot crossing there were houses which, on one side at all events, until one got close to the rails, obstructed the view up and down the line, and under these circumstances I think it was the duty of the defendants to take reasonable precaution to warn foot passengers who might be about to cross, or who were crossing, of the approach of a train. A jury might say that the defendants ought to so manage the pace of their train as not to come suddenly upon persons who were crossing the rail or that the train should have whistled." I need not burden this portion of the case with further citations of a similar character, neither need I refer to the highly elaborate and even, if I may so speak, sublimated judgments of the House of Lords in the leading case of *Dublin, &c., Ry. Co. vs. Slattery*, because those judgments, from the form in which the case was presented, will be found to be almost entirely concerned with the proper application to the particular facts of that case of the legal theory as to the respective functions of judge and jury.

Proceeding to apply the law to the facts of the present case, it is stated by the plaintiff in his declaration, and expressly admitted by the defendants, that on the occasion of the accident "the plaintiff, as he lawfully might, was driving his cab along a thoroughfare in Bultfontein known as the old Kimberley Postal Road, and was obliged to cross certain tram-lines belonging to the defendants at a place

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where the said lines cross the said road." The declaration, after stating the accident, further alleges that "no warning or signal of the approach of the said engine was given, and the defendants neglected to station any person at the said crossing for the purpose of giving warning, although required so to do by Rule 28 of the bye-laws of the Bultfontein Mining Board promulgated on Dec. 11, 1885, under the provisions of Act 19 of 1883." This allegation the defendants denied, and the plaintiff, for some reason which was unexplained, did not rely on it at the trial; but it is the fact that by Proclamation 197 of 1885, dated Dec. 11, 1885, and published in the *Government Gazette* of Dec. 25, certain rules and regulations for Diamond Mines were promulgated under the Act of 1883, and Rule 28 provides that "wherever a tramway passes over a public thoroughfare at a level crossing, the claim-holder or miner using the tramway shall station, at the point of crossing, a signalman, bearing a red flag, who shall give notice to the public of the approach of trucks, &c." It is difficult to understand how it can be denied that this road, being admittedly a thoroughfare, and being in fact, as was obvious on inspection, a thoroughfare where there is a considerable amount of traffic proceeding between Main Street, Bultfontein, and the Beaconsfield Market Square, is a public thoroughfare within the meaning of this rule. All that need now be said on this subject is that the defendants are not being proceeded against for a contravention of this rule and, although referred to in the pleadings, it was not relied on at the trial. Apart, however, from any statutory regulations, the case is one of a tramway crossing a thoroughfare at a level crossing. At this crossing there are no gates and there was no signalman, and no steps of any kind were taken by the defendants to warn travellers on the road of the approach of trains. The crossing in my opinion—and notwithstanding the dictum to the contrary of Mr. Wollaston—was distinctly a dangerous crossing, and after an inspection of the scene of the accident it is easy to understand why Dr. Harris, who when driving about on his professional errands has usually a boy by his side, is in the habit of pulling up when approaching this point, and sending his boy on to see if



there is any train coming. It is not, however, every driver who has a boy by his side whom he is able to employ in this manner as a scout. Mr. Wollaston, the manager of the defendant company, admits that a boy with a flag should be stationed at crossings where the line crosses a street; and with regard to this admission I must observe that the road at this point is on one side, and on the side from which the engine on this occasion approached, to all intents and purposes a street, the view of the tramway, to one approaching in the direction in which the plaintiff was travelling, being almost completely obstructed by a nearly continuous row of houses. It is true that between the row of houses furthest from the crossing and standing back from the road and the other row, nearer to the crossing and nearer to the road, there is a gap through which the approaching traveller might for the space of some 21 feet, if he looked in that direction, see a portion of the line and an approaching train, if it happened at the same moment to have reached, and not to have passed beyond, this section of the tramway; but after this slight and doubtful opportunity there was no chance of seeing an approaching train till within a very few yards of the crossing, the view being obstructed, as was obvious on the inspection, not only by the houses, but also to a considerable extent by the trees and shrubs in the garden of the house nearest to the crossing. In fact, when we got into a cab and drove over the crossing, and a train with empty trucks came up along the line, our experience was that we neither saw nor heard it till just as we had crossed the line, the warning to the car given by sound being much less than, in the absence of an actual test, I should have imagined would be the case. In all the circumstances I am of opinion that the defendant company were not justified in running their trains across this road, as in fact they did, without taking any precautions whatever. They might have stationed a signalman at the crossing with a flag; they might have instructed their drivers on approaching the crossing to slacken speed; they might have instructed them to whistle as soon as they passed the engine shed, and to continue whistling while approaching the crossing. They gave their drivers no instructions of

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the kind, nor, as it appears, any written orders or directions of any description. Mr. Wollaston, indeed, informs us that it was formerly the practice to whistle, but that this had been to a great extent discontinued owing to the complaints of residents in the neighbourhood. I can quite understand that the whistling might be regarded by such persons as a nuisance; but if for the reasons assigned, or for any other reasons, the company neglected to take precautions, some or all of which were in the circumstances necessary, they cannot be said to have displayed such *exacta diligentia* as the law requires, and must be held responsible for any accident resulting from such neglect.

Was there, then, what the law regards as contributory negligence on the part of the plaintiff? As to the law on this subject I will not repeat but will merely refer to what I said in the recent cases of *Packman vs. Gibson Bros.*, 4 H. C. 410, and *Cowell vs. Friedman & Co.*, 5 H. C. 22. As to the plaintiff's behaviour there is considerable conflict in the evidence, and it is unfortunate that it was impossible for him to procure the testimony of the two native servants of the defendant company, who were his passengers at the time, and who would doubtless have given us an impartial and probably an intelligent account of the affair. It is admitted, however, that the plaintiff was where he had a right to be, and that he was driving his cart at a reasonable pace. And it may here be observed that many of the observations and decisions on the subject of contributory negligence contained in the cases which I have cited—the cases of *Cliff*, *Stubley*, *Davey* and *Slattery*—in a case like the present require considerable modification, for the simple reason that all those cases were cases of foot-passengers. But in the case of a man driving a cart, his attention is necessarily much more occupied and more liable to be diverted than that of a pedestrian. He has to keep an eye on his horses, on the road, on other traffic, both horse and foot, and he is also unable to come to a standstill as rapidly as a person who has merely to arrest the motion of his own limbs. Now I cannot think that there was any negligence on the plaintiff's part in not observing the approaching train through the gap between the houses above referred to. He

was no more bound to perceive the train than the engine driver, Willis, was to perceive the cart; neither in fact observed the other; and had it not been for the evidence of Zeiss, who says that he did see the cart, and who, if that was so, ought to have given Willis a warning and called his attention to it—had it not been for the evidence of Zeiss, I should have thought it quite possible that when the plaintiff traversed this particular spot the train had not yet emerged from behind the shed. Then as to what happened afterwards I am disposed to regard the version given by the plaintiff, and corroborated by the independent evidence of Johnson, as being substantially correct. That version is to the effect that he never saw the engine till he was within a very few yards of the crossing, the engine being then about 15 yards off, and approaching at full speed—not indeed a very high rate of speed, but probably from 10 to 12 miles an hour; that he pulled his horses up as soon as he could, but only succeeded in doing so and partially turning the cart just as he was on the crossing; that as the engine passed just in front of the horses' heads they swerved round with such violence that he was thrown out and, the wheel of the cart passing over his leg, thus sustained the injuries complained of. The witnesses for the defence, on the other hand, assert that the plaintiff must have either seen or heard the train when he was some distance off, and accordingly pulled up his horses, but afterwards made a dash with the idea of getting over in front of the engine, and that finding he was unable to do this at the last moment he got out and then fell and so was injured. Now it is highly improbable that any reasonable being would act in the manner thus described; and besides this *a priori* improbability, there is the fact that the defendants' witnesses contradict each other in several by no means unimportant particulars. Cooper, for instance, whose evidence generally was far from satisfactory or coherent, places the spot where the plaintiff is said to have pulled up a long way off the place indicated by Willis and Zeiss, and almost exactly opposite Johnson's door, where it seems impossible for this to have happened without Johnson seeing it. Then, discarding the evidence of Cooper, Willis and Zeiss themselves

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disagree on more than one point. Thus Willis says that the plaintiff got out of his cart and was standing on the ground when he tripped or fell, while Zeiss says that in getting out he tried to put his foot on the step and missed it and so fell. It may be difficult to affirm with confidence, neither does it seem to be very material, what were the precise details of the accident; the case is one of those in which, as experience shews, intelligent eye-witnesses often give accounts in perfect good faith which it is wholly impossible to reconcile one with the other; but there can be no real doubt that the direct and immediate cause of the accident was that the plaintiff's horses took fright owing to the imminent danger of a collision; and this danger I am of opinion for the reasons already assigned was produced by the neglect of the defendant company to take proper precautions to avoid such accidents, and without any such conduct on the part of the plaintiff as a reasonable jury would hold to be contributory negligence.

There is, however, one other point in the case which perhaps requires some consideration. There having been no actual collision, and the plaintiff having been injured owing to the restlessness of his own horses, can the defendants properly be held liable therefor? Now here the principles which I had occasion to discuss at great length in the case of *Cowell vs. Friedman & Co.* appear to be applicable. If an animal does mischief *commota feritate*, owing to its own natural ferocity, the owner is liable for the *pauperies*; but if the animal is, as Pothier puts the distinction, *non commota sed incitata*, the person who produced the *incitatio* is responsible for the damage. A good deal of metaphysical subtlety has been expended in the English Courts in some of these cases in distinguishing between the *causa proxima* on the one hand and the *causa causans*, or *causa sine qua non*, on the other; but it is perhaps sufficient to observe in general terms that the person without whose conduct the damage would not have happened is responsible for it unless the damage is too remote. What constitutes such remoteness may be illustrated by a reference to the recent case of *Victorian Ry. Commissioners vs. Coulton*, 13 A. C. 222, where the Judicial Committee of the



Privy Council held, reversing a judgment of the Supreme Court of Victoria, that "damages in a case of negligent collision must be the natural and reasonable result of the defendant's act; damages for a nervous shock or mental injury, caused by fright at an impending collision, are too remote." In this case the Judicial Committee, without laying down that it was necessary to prove "impact," held that where there was no bodily injury the claim for "damages arising from mere sudden terror, occasioning a nervous or mental shock, could not be sustained." That, however, is not the present case, which seems rather to fall within the rule laid down by the Master of the Rolls in the case of the *Notting Hill*, 9 P. D. 105, and expressly approved by the Judicial Committee in the above case, namely, "that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act." The law on the subject may be further illustrated by reference to the case of *Sneeshy vs. Lancashire and Yorkshire Ry. Co.*, 1 Q. B. D. 42, where, the defendants having negligently sent some trucks over a crossing which some cattle were crossing at the time, the cattle were separated from the drovers and got frightened and rushed away and were afterwards injured at another place where they had got on to the line. The company was held liable in the Court of Queen's Bench and afterwards on appeal, when Lord Cairns observed that "the defendants' servants were guilty of negligence in allowing the trucks to move down at a time when, if they had not been guilty of negligence, they would have seen the cattle were crossing. The result of this negligence was two-fold. First, the trucks separated the cattle from their keepers; secondly, the cattle were frightened and became infuriated, and were driven to act as they would not have acted in their natural state. Everything that occurred or was done after that must be taken to have occurred or been done continuously." In the present case it is sufficient to say that the damage appears to have been the natural result of the immediate danger of collision caused by the defendants' negligence, and for which they are therefore bound to compensate the plaintiff. As to the amount, fortunately

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for the company the damage was not very great, and I cannot altogether accept the basis on which it has been calculated by the plaintiff. His doctor's and chemist's bills together amounted to seven guineas. Then we must take it that he was disabled for three weeks, and had to employ a substitute in his butchery, whom he paid £3 a week. Then he says that he lost about £2 a day through not being able to drive his cab, and not knowing any one whom he could rely upon to drive it for him. But I see no sufficient reason why he should not have engaged a substitute for this purpose also, and if we allow him another £3 a week on this account, or in other words if we take the value of his personal exertions at a pound a day, I think we shall be awarding a reasonable amount under this head. This will come to £6 a week for three weeks, that is, to £18 in addition to the £7 7s., or £25 7s. in all. Then the plaintiff may fairly ask in addition for some moderate, but not extravagant, compensation for the pain and inconvenience he suffered, and on the whole I think justice will be done by entering judgment in his favour for the sum of £35 and costs.

SOLOMON and COLE, JJ., concurred.

[Plaintiff's Attorneys, PLAYFORD & FITZPATRICK.]  
[Defendants' Attorneys, H. C. & J. C. HAARHOFF.]

#### HESSEN AND OTHERS vs. DAOUT.

*Mohammedan Law.—Mosque—Vakheels.—Appointment and dismissal of Imam.*

*According to Mohammedan law, the founder of a Mosque, or the duly appointed Vakheels or Trustees, as the representatives and with the consent of the majority of the congregation, have the right on any reasonable ground to summarily dismiss the Imam or Priest.*

*A site for a Mosque was granted by the owners of the soil to the Indian Mohammedan community at Kimberley and a*

*lease was subsequently executed, demising the property to trustees on their behalf and for that purpose. Previous to the execution of the lease, the Indian Mohammedans, finding themselves unable to erect the Mosque without the assistance of other members of the same faith, obtained such assistance on the understanding that the Mosque when completed should belong to the general Mohammedan community. In pursuance of this agreement, the Mosque was built and the Imam was elected and his stipend paid by the general body of Mohammedans. Subsequently the Indians claimed the right to dismiss the Imam without consulting and contrary to the wishes of the other and larger portion of the congregation. An action brought to enforce this claim was dismissed with costs.*

The main question raised in this action was whether a certain Mosque at Kimberley was the property and under the exclusive control and management of the Indian Mohammedan community, of which the plaintiffs alleged that they were the duly appointed Vakheels or Trustees, or whether, as contended by the defendant, these rights were vested in the general Mohammedan community, consisting of Malays and others as well as Indians, resident on the Diamond Fields. The pleadings and evidence are so fully set forth and dealt with in the judgments of the Court that a brief sketch of their tenor and purport will be here sufficient. The plaintiffs alleged that the Mosque in question had been erected on a site the lease of which was granted to their predecessors in office on behalf of the Indian Mohammedan community, by whom the defendant had been appointed Imam or Priest, and by whom in August, 1888, he had been dismissed from that office, which dismissal, however, he had disregarded, and persisted in continuing to officiate as Imam, by which conduct the religious worship of the community had been interfered with and prejudiced, wherefore the plaintiffs claimed damages and a perpetual interdict restraining the defendant from a repetition of the acts complained of. The defendant denied the capacity of the plaintiffs, and alleged that the Mosque belonged to the general Mohammedan community, of whom

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the Indians formed a portion, and had been erected at the expense of such community, and was used by them as a place of worship, and he had by them been duly appointed Imam, and still continued to hold that office, and had never been lawfully deposed from it, or done anything to forfeit the same. He further pleaded that the meeting, at which the plaintiffs had been appointed Vakheels and it had been resolved to give him notice of dismissal, was composed exclusively of Indians, and no notice thereof was given to the other and larger portion of the general Mohammedan community, and that this was so was admitted by the plaintiffs in their replication, in which they joined issue with the defendant on the other portions of his plea.

From the evidence it appeared that the majority of the Mohammedans at Kimberley were Malays, or persons of Cape origin, but that there was also a considerable number of Mohammedans from India. Up to 1885 both sections worshipped together in one Mosque, situated in Coughlan Street, Kimberley, of which the defendant, who was a Malay and a mason by trade, had for some years been the Imam or priest. In 1885 a petition was addressed to the local manager of the L. & S. A. Exploration Company for a site for a new Mosque for the Indians. This petition purported to be signed exclusively by Indians, but in point of fact a certain number of Malays signed as well. The site was granted, and the Mosque partially erected, the organiser of the movement being one Aloo Khan Arabi, an Indian, and the expenses being defrayed mainly by the Indians, but with certain contributions in the way of bricks, &c., from one or two Malays. When the work had been some time in progress, Aloo Khan applied to the defendant for certain moneys, which had previously been subscribed by Indians for the purpose of erecting a new Mosque should the one in Coughlan Street be required for other purposes, and these moneys were handed over. At the same time, according to Aloo Khan, the defendant volunteered his assistance towards completing the Mosque, and this was accepted, but strictly on condition that such assistance should confer on the Malays no right in the property or its administration. The evidence for the defence, however, was to the effect that

Aloo Khan appealed to the defendant to help him as the work had come to a standstill, and he could obtain no more money from the Indians, and it would be discreditable to the entire Mohammedan community if the Mosque were not completed. The defendant then called the Malay members of his congregation together, and they agreed to help on receiving an assurance from Aloo Khan that the Mosque when erected should belong to all alike. After this the defendant and other Malays worked on the Mosque as masons without wages until it was completed, and a considerable sum was collected for the building fund from the Malays by Aloo Khan, and with the help of the defendant's influence and support. The Mosque having been finished and certain Indians, of whom Aloo Khan was one, having been elected trustees, how or in what circumstances did not precisely appear, an opening feast was held, the expenses of which were defrayed, according to Aloo Khan, exclusively by the Indians but, according to the evidence for the defence, by the Indians and Malays jointly. The Mosque was then opened, and the defendant was elected priest, according to Aloo Khan, by the Indians with the acquiescence of the Malays, while the witnesses for the defence asserted that just the reverse took place. The defendant then began to officiate in the new Mosque, and his former congregation followed him, and the Coughlan Street Mosque was afterwards converted into a school. Some expenses in connection with the building still had to be defrayed, and some accounts for materials to be paid, and these sums were in part raised by collections in the Mosque made by the defendant, and in part out of gifts which had previously been made to him to be applied for the purposes of a new Mosque should such be erected. Arrangements were also made to guarantee the defendant a stipend as priest, the guarantors consisting of Indians and Malays in about equal proportions. It was not until more than a year after the completion and opening of the Mosque that the lease of the site was executed by the Exploration Company and the Vakheels, the lease having been drafted in England and the demise of the premises being made to and for the purposes of the Indian Mohammedan community ;

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of the existence and terms of this lease, however, the defendant stated that he had no knowledge till the present action was brought. All apparently went well and no difficulty arose until the middle of 1888, or nearly three years after the opening of the Mosque, the Indians and Malays till then worshipping together and the defendant officiating as Imam. At this period a person named Sheikh Mahomet arrived in Kimberley. He had previously officiated elsewhere as Imam and was admittedly a man of greater learning and attainments than the defendant, and was also, as were most of the Indians, a member of the Hanafite sect, while the defendant and most of the Malays were of the opposite or Shafite sect. The Indians accordingly desired that Sheikh Mahomet during his stay in Kimberley, the duration of which was uncertain, should officiate as Imam in place of the defendant, and evidence was called at the trial to the effect that when a man of greater learning and religious knowledge arrived it was the duty of the Imam, according to the precepts of the Mohammedan faith, to make way for him. Evidence was also produced, both of experts and in the shape of extracts from books regarded as authoritative, that it was competent for the founder, or the Vakheels who might be appointed to represent him, to at any time dismiss the Imam should that course appear desirable. On the wish of the Indians being communicated to the defendant, the Malays intimated their disapproval and the defendant, according to his own statement, declined to be removed by the Indians, unless they could prove that they had the legal power to do so, at the same time pointing out that there was nothing in the principles of Mohammedanism to prevent members of the Hanafite sect from worshipping under a Shafite Imam or *vice versa* as occurred for instance in Mauritius. The Indians then held a meeting, to which the Malays were not convened, and proceeded to appoint the present plaintiffs as Vakheels, in place of the original Vakheels, who had ceased to reside in Kimberley, and at the same meeting a resolution was passed deposing the defendant as Imam. The defendant, however, on the following day, which was a Friday, notwithstanding notice of this resolution, persisted in acting as



Imam and, according to the evidence for the plaintiffs, although Sheikh Mahomet was present and prepared to officiate, this intention was frustrated by the defendant prematurely occupying the pulpit, before the Hanalites had completed their devotions, and without waiting to be escorted to the pulpit by an attendant at the usual time and in the usual manner. Two days afterwards, it being an important feast-day, the plaintiffs alleged that the defendant committed another serious breach of ritual by beginning the service without waiting as he should have done till the sun was three fathoms high in the heavens. The defendant, however, alleged that on both these occasions he had acted in accordance with his usual practice, and without breaking any rules of the Mohammedan ritual, and in these assertions he was corroborated by some of the Malay members of the congregation. The defendant having refused to comply with the notice of dismissal, or to recognise its validity, the present proceedings were instituted, and evidence was taken on both sides at considerable length, but its effect, so far as material, is sufficiently indicated in this summary and in the judgments reported below.

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*Frames* (with him *Feltham*), for the plaintiffs, referred to *Perry vs. Shipway*, 28 L. J. Eq. 660; *Cooper vs. Gordon*, 38 L. J. Eq. 489; *Jones vs. Jones*, 10 B. & C. 718; *Nicholl vs. McKaeg*, *ibid.* 721; *Attorney-General vs. Pearson*, 3 Meriv. 353; *Voet*, 26. 1. 62. He submitted that the legal title was in the plaintiffs as representatives of the Indian Mohammedans to whom the Mosque belonged. The Malays had contributed to the erection of the Mosque merely as an act of piety, and all they asked for in return was that they should have free access to it as a place of worship and, even if anything further had been promised by Aloo Khan, he had no authority to give such assurances. He argued on the facts and on the evidence as to Mohammedan law that nothing had occurred to prevent the Vakheels from exercising their right to dismiss the Imam and that the defendant's position was that of a mere trespasser.

*Lange* (with him *Joubert*), for the defendant, relied on the agreement between Aloo Khan, as representing the Indians,

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and the Malays, at the meeting at the defendant's house, and contended that the Imam could not be summarily dismissed without due cause. The defendant had been appointed Imam by the whole Mohammedan community and they alone had the power of deposition. The Indians had never repudiated, and by their subsequent conduct had ratified, the agreement made with Aloo Khan, without which the Mosque would never have been built. When the defendant was appointed, the lease or trust-deed on which the plaintiffs relied was not in existence and he could not be bound by its terms. [SOLOMON, J., referred to *Merriman vs. Williams*, Foord's Rep. 135.]

*Frames* replied.

*Cur. adv. vult.*

*Postea* (Oct. 25),—

LAURENCE, J.P., said :—The plaintiffs in this action allege that they are the duly appointed Vakheels or Trustees of the Indian Mohammedan community in Kimberley, and that the said community is a religious body possessing a place of worship called a Mosque, the lease of the site of which was granted to the predecessors in office of the plaintiffs on behalf of the said community, and the plaintiffs by the terms of the said lease and the constitution of the said body are the proper persons to sue in this action. A copy of the lease is annexed to the declaration, and it appears therefrom that the site was granted by the Exploration Company at a nominal rent solely for the purpose of the Mosque which, previous to the execution of the lease, had already been erected thereon, and which is described in the lease as “belonging to the Indian Mohammedan community,” and the lease further contains a special proviso that “in case the said plot of ground hereby demised or the buildings to be erected thereon or on any part thereof shall respectively at any time during the said term hereby granted or any renewal thereof cease to be used for the purpose of the said Mosque of the Indian Mohammedan community, then immediately upon the happening of such

event this present demise or any renewal thereof shall absolutely cease and determine." The plaintiffs go on to allege that the defendant until August 1888 was the Imam or Priest of the Indian Mohammedan community, having been appointed as such by the said community in 1886, and that on Aug. 15, 1888, it was resolved by the Indian Mohammedan community at a duly convened meeting to dismiss the defendant from his position as Imam. Due notice of this resolution was given to the defendant and by such resolution and notice his appointment as Imam was determined and his right to act as such ceased. The defendant, however, has ignored this notice, and on the 17th and 19th of August by force and fraud obtained possession of the pulpit in the Mosque during service, and persisted in conducting the religious service therein, and still maintains his right to continue to act as Imam, by which conduct the religious worship of the community has been interfered with and is likely to be prejudiced in the future. The plaintiffs claim damages, an interdict, general relief and costs of suit. The defendant in his plea denies the plaintiffs' alleged capacity as the duly appointed Vakheels or Trustees of the Indian or any other Mohammedan community. He alleges that the Mosque in question is in the possession, as a place of worship, and was erected by and at the expense of the general Mohammedan community of Kimberley, which is composed not exclusively of Indians but of various nationalities and sects. While admitting the granting of the lease, the defendant denies that the plaintiffs are the successors in office of the original lessees or that they are the proper persons to sue in this action. He pleads that in or about Sept. 1885 he was duly appointed Imam by the general Mohammedan community, and still holds that office by virtue of such appointment, that he has never been lawfully deposed therefrom or done anything to forfeit the same, and he maintains his right to continue in the said office and to perform and conduct the religious services in the said Mosque until formally deposed in accordance with the laws and precepts of the Mohammedan faith. He further pleads, and it is admitted by the plaintiffs in their replication, that the meeting at which the resolution for his

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deposition was passed was composed entirely of Indians, and that no notice thereof was given to the other and larger portion of the Mohammedan community. He contends that this meeting was illegally constituted and its proceedings consequently of no effect and in conclusion, while maintaining his right to act as Imam, denies the allegations of force and fraud contained in the declaration, as to which allegations I will at once shortly state that in my opinion they have not been proved, and the plaintiffs have failed to shew that on the occasions in question any breach of ritual or violation of the practices of Mohammedan worship was, at all events intentionally, committed by the defendant. Now on the various issues raised on the pleadings a great deal of evidence was taken, both on questions of fact and on questions relating to Mohammedan law and religion. None of this evidence, from the point of view of the parties, can be fairly described as irrelevant or unnecessary, and in the course of it certain legal questions were raised of considerable interest and importance and the determination of some of which might be a matter of no small difficulty. However, in my view of the case these questions may be very briefly disposed of, for I think that our decision must be mainly based not so much on these matters as on a consideration of the facts which in this particular case have been proved in evidence. I will, therefore, before examining these questions of fact, premise by stating shortly that in my opinion it is clearly established that where a Mosque has been founded by a congregation the duly elected Vakheels or Trustees, acting as the representatives and in accordance with the wishes of such congregation, have the right on any reasonable and not merely capricious ground to give the Imam notice of dismissal. Such was the contention of the plaintiffs and I did not understand the defendant in his evidence to dispute this right. I am also of opinion that, assuming the congregation in the present case to have consisted exclusively of the Indian Mohammedans, the plaintiffs have been shewn to be their duly appointed and elected representatives, and that the grounds assigned for dismissing the defendant—namely, the desire to secure the services of an Imam of admittedly greater learning and



belonging, like the great majority of the Indians, to the Hanafite sect—even if the proceedings which actually took place may be regarded in certain aspects as harsh, yet cannot be described as merely frivolous or capricious. The real question therefore to be determined is simply whether the congregation or members of this Mosque consisted exclusively of the Indian Mohammedan community, or, to put it in another form, was the meeting of the 15th of August, when the Vakheels were appointed and the resolution for the defendant's dismissal was carried, a duly convened meeting of all those entitled to participate in the management of the Mosque and the appointment or dismissal of its officers? If this question is answered in the negative it is clear that the plaintiffs were never duly elected as Vakheels, that they are not the legal successors of the original lessees and that the defendant's plea of their non-qualification must be upheld. In this event also it would become unnecessary to consider in detail the English cases cited on behalf of the plaintiffs, as in all those cases the Minister was dismissed by persons who were held to have the legal right to do so. The answer to this question, on which the whole case hinges, appears to me, as already intimated, to depend on the view taken by the Court of the evidence on questions of fact, which I therefore now proceed to consider.

It appears that in Kimberley there is and has long been a Moslem community of considerable size. The majority of the Mohammedans by faith are Malays by race, but there is also a considerable number of Indians and a few Arabs and others. Most though not all of the Malays belong to the sect of the Shafites and of the Indians to that of the Hanafites. The defendant is a Malay and a Shafite, but there is nothing in the Mohammedan religion to prevent Hanafites from worshipping where the service is conducted by a Shafite Imam or *vice versa*. Until 1885 the only Mosque in Kimberley was that situated in Coughlan Street and now used as a Mohammedan school. In this Mosque the defendant had officiated for over ten years and the services appear to have been attended more or less regularly by all the Moslems without distinction of sect or race. At

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the beginning of 1885, however, a movement was got up among the Indians, and principally as it would appear by one Aloo Khan Arabi, who is the leading witness for the plaintiffs in this action, the object of the movement being to erect a Mosque for the use of the Indian Mohammedans alone. With this end in view an application was made to the Exploration Company for a site, and a letter, with a hundred signatures in Arabic attached, was addressed to the local Manager of the Company. The signatories to this letter or petition describe themselves as being "Mohammedans belonging to Bombay in the Empire of India, who are residents on the Diamond Fields." They add, "we are about a hundred persons at present—we are a nation from India; we therefore beg you to be good enough to grant us our request. All the other sects in Kimberley have their places of worship; we moreover let you know that we are not of the low Indian class, but those of a more enlightened race. We at present have no place of worship, and the Mohammedans here are not of the same strict sect as we are." The application thus made was acceded to by the Exploration Company, a site was granted and, more than a year after the Mosque had been erected and opened, the lease relied on by the plaintiffs and already referred to, and which had been drafted in England, was executed by the Company as lessors and by three Indians, of whom Aloo Khan was one, and who it is stated had been elected the original Vakheels shortly before the Mosque was completed, as trustees on behalf of the congregation. It appears, however, from the evidence that the representations contained in this letter, and on the strength of which the site was granted, were in some respects incorrect; for while the petitioners represented themselves as being exclusively Indians from Bombay, and persons of a peculiarly enlightened race, the fact is, according to the evidence of Hadji Rajap, a Malay called for the plaintiffs, that he not only signed the letter himself but at Aloo Khan's request obtained the signatures of fifteen or sixteen other Malays as well. It is true that Aloo Khan denies this, and says that there were only two or three Malay signatures; but, for reasons to be subsequently mentioned, where Aloo Khan is in

conflict with other witnesses I am not inclined to give much credit to his testimony. It is at all events admitted that some of the signatories to this letter were really Malays; and as might have been expected Mr. Currey, the Manager of the Exploration Company, states that, had he been aware of this fact, it would have made a material difference in the representations which he made to his Company on the subject, and on the strength of which the lease was granted in its present form. It may also be material to observe that some at all events of the Malays, including Hadji Rajap, were undoubtedly among the original grantees, on whose application the site was given for this Mosque, from the control and administration of which the plaintiffs now claim that all the Malays are to be excluded. Then the site having been pointed out Aloo Khan began to build the Mosque, mainly with contributions from the Indians, but not without assistance from Abdol Jappa and other Malays. When, however, the walls had reached the height of about six feet, there was a pause in the work. Aloo Khan says that he was waiting for the walls to dry. I think the real reason was that the liberality of the Indians had run dry, and he could no longer find funds to pay for materials and for the wages of the workmen. In these circumstances Aloo Khan appealed to the defendant for help. There is some conflict between Aloo Khan and the defendant as to the details of what then took place, but the defendant's version is supported by several witnesses, while that of Aloo Khan is uncorroborated, and I regard the former as substantially correct. In the circumstances in which he was placed, to secure the help of the defendant had become to Aloo Khan a matter of vital importance. There were at least four ways in which the defendant could give assistance. In the first place he was in possession of the sum of £45, of which it seems £33 had been subscribed by Indians, and the balance by Malays, some time previously for the erection of a Mosque in the event, which there was some reason to anticipate, of the Exploration Company requiring the congregation to remove from that in Coughlan Street, which was said to encroach on a thoroughfare. Besides this £45, there was another sum of £50 which Hessen, one of the present

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plaintiffs, and who was then absent from Kimberley, had deposited with the defendant to be used for a similar purpose. Hessen from his evidence appears to be a liberal and enlightened man, and he stated distinctly that he had given that sum of £50 for the erection of a Mosque not exclusively for the Indians but for the general Mohammedan community, and its disposition for that purpose was entrusted to the defendant. Then again the defendant was a mason by trade and capable, if he felt so disposed, of giving valuable assistance with his own labour towards the completion of the Mosque. Lastly, he was in a position, if he thought fit, to bring his influence to bear on the Malay members of his congregation and induce them to contribute to the work. The defendant says that in these circumstances, when Aloo Khan appealed to him, he said that he could do nothing, except as to handing over the £33, which was done, without first consulting his congregation. Accordingly he called a meeting at his house and laid the matter before those who assembled in the presence of Aloo Khan. Aloo Khan denies that he was present at this meeting; but the defendant's statement on this point is supported by the evidence of other witnesses and I think must be taken to be correct. It is true that there is some discrepancy between the statement of Hadji Mogadies and those of the other witnesses as to whether Aloo Khan was actually in the room when the defendant addressed the meeting; but even Hadji Mogadies states that Aloo Khan came to the meeting and that the result was at once communicated to him. As to what took place at the meeting, there are certain slight discrepancies in detail; but the general effect is that some of those who were present inquired to whom the Mosque, in the building of which they were asked to help, would belong when completed, that Aloo Khan stated that it would belong to all the Moslems, and that they then agreed to help. It is contended for the plaintiffs that at the utmost there was merely an assurance given that the Malays equally with the Indians would have the right to worship in the Mosque, which is a very different thing from having a right to share in its management; but it is difficult to believe that such an assurance could have been the object of the question which

was raised, since it is perfectly clear and must have been well known to those who were present that all over the world, wherever a Mosque is open, there all the faithful have an equal right to enter in and worship. Neither is it in accordance with human nature to suppose that the Malays would have agreed to give their money and their labour to build up what would really have been a sort of rival temple to their own, and one in the management and administration of which they were to have neither act nor part. For these reasons, although the language employed was vague, and the rights now set up by the Malays do not appear on this occasion to have been either claimed or conceded in terms of legal precision, on the whole I am inclined to the conclusion that the understanding then arrived at was substantially of the nature now alleged by the defendant. It is, however, a more difficult question whether Aloo Khan had any authority by his assurances to bind the Indian community to whom the site had been granted by the owners. It is true that at this time he seems to have been the only person capable of acting as their spokesman or representative in the matter, and he was shortly afterwards appointed one of the original Vakheels, but his legal authority is at all events extremely doubtful, and for my part I should for this reason hesitate to affirm that the proceedings on this occasion, standing alone, gave the Malays any legal rights which they did not previously possess. I cannot, however, doubt that their conduct, and especially that of the defendant from this time forward, was based on the assumption that such rights had been acquired, and it was conduct from which the Indian Mohammedans reaped and accepted very substantial benefits. In fact, had it not been for the action of the defendant and his followers, it is extremely doubtful whether to this day the Mosque would have been completed or whether the walls would not have still been allowed "to dry." The defendant besides the £33 appears to have subsequently applied part at all events of the £12 originally collected from the Malays to the purposes of the Mosque; to the same purposes he applied at all events the bulk of the £50 deposited with him by Hessen; he sent out Malays to collect with Aloo Khan, and it is admitted that they did

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collect substantial sums from the Malays, sums of which it is now impossible to ascertain the amount because it was Aloo Khan who entered the items, as he says without mentioning the names of the donors, and he has unfortunately lost his collecting book in which these entries were made. In addition to all this, the defendant and two other Malays gave their labour gratuitously as masons, and worked at the Mosque for a period of about two months till it was completed, labour which, if we take the value of each workman's time at the moderate sum of £10 a month, would represent a contribution of about £60. And if to this £60 we add the bricks contributed by Abdol Jappa, the £50 entrusted to the defendant, with the object already stated, by Hessen, the £12 previously collected by the defendant from Malays, the collections which he subsequently made, and the substantial amount which it is admitted that Lanie Hendricks and others collected from Malays, when they went round with Aloo Khan—taking all these sources together, we arrive at the result that of the total cost of the Mosque, which is stated to have been between £300 and £400, something very like half must in one form or another have been contributed by the defendant and other Malay members of the Mohammedan community. Without the exertions and influence of the defendant the Mosque, as I have said, would very probably have never been completed; with his own hands he built up the fabric; and looking to Aloo Khan's then position and his present attitude, the defendant really might well exclaim, if he added a knowledge of the classics to his knowledge of Arabic:—

*Nusquam tuta fides. Eiectum litore, egentem,  
Excepi et regni demens in parte locanti.*

I now come to the period when the Mosque was at length completed and the "Mawlood" or opening feast was given at the house of Aloo Khan. Here again Aloo Khan is unfortunately in conflict with the other witnesses. He says that the Malays were invited to the feast but the cost of it was entirely defrayed by the Indians. His object in endeavouring to make out that such was the case is obvious; but the probabilities of the case and the balance of evidence are again against him, and besides the defendant himself,



who gave half a sovereign, no less than three Malays were called—Jonge Malan, Lanie Hendricks and Sam Salie—who all, at Aloo Khan's request, contributed to the cost of the feast and who are aware that other Malays did the same. After the feast there was an adjournment to the Mosque, an opening ceremony or religious service of some description took place and the congregation then proceeded to elect an Imam. As to what then took place it is again a case of *Athanasius contra mundum*—Aloo Khan against all the other witnesses. The other highly respectable witnesses who were called by the plaintiffs—such as Hadji Hessen, Hadji Ally and Achmet Effendi—were not in Kimberley at the time and Aloo Khan's account of the proceedings is wholly uncorroborated. What he says is that he spoke to the Indians in the Mosque in Hindustani, and asked them who should be the priest, and they chose the defendant as their priest, and the Malays were then told that the choice had fallen upon Daout, and expressed their satisfaction with the result. Aloo Khan says that he must have spoken in the Indian language because at that time he could not speak two words of Dutch. In Court he gave his evidence in very fair English; and it seems that he has been here a long time in business and is married to a Cape Malay woman, the daughter of Abdol Jappa, and when he asserts that he was wholly unable to speak Dutch I can only say that I do not believe him. The evidence of the defendant is that Aloo Khan addressed the assembly in Dutch and said the Mosque was now finished, and there were three possible priests—Hadji Grimpi, Hadji Rajap and the defendant himself. The Malays then said they wanted Daout for their Imam, the Indians assented and the names of those who were present were taken down and Daout was unanimously elected Imam. This was on the Thursday evening. The defendant stated that he could not officiate the following morning, as his services would be required at the Coughlan Street Mosque, especially as some of the members of that congregation were not present at the election. He accordingly went to the Coughlan Street Mosque the next morning, the Friday, informed the congregation that he had been elected Imam of the new Mosque, and began to

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officiate there on the next Sunday, which was a feast day and has done so ever since. For a week or two after this Hadji Rajap officiated before a small and dwindling congregation in Coughlan Street; but the whole congregation before long went up to the new Mosque, and have ever since continued to worship there, the old Mosque as already stated being converted into a schoolroom. It is true that Hadji Rajap and Abdol Jappa state that the defendant informed the Coughlan Street congregation on the Friday that he had been elected Imam by the Indians, but the defendant's version of how the election took place is corroborated by no less than five witnesses—by Jongie Malan, Hadji Mogadies, Lanie Hendricks, Sam Salie and Hanafite Tahat—and I entertain no doubt that it is substantially the correct version. We have thus the facts established that while the site for the Mosque was granted on a petition purporting to emanate from, but in fact not exclusively emanating from, the Indian Mohammedans, the Mosque was erected at the joint expense, in substantially equal shares, of the Indians and the Malays, and on the distinct understanding that both sections should have an equal right to it when completed. Whether this understanding, and the assurances on the subject given by Aloo Khan, were effectually binding on the Indians, may, as I have said, be doubtful; but that doubt seems to be substantially removed by the fact of the joint election of the Imam, and it is difficult in all the circumstances of the case to see how the Indians, having admitted the Malays on an equal basis to participate in the election of the priest, and having in fact followed their lead in the matter, can now with any appearance of reason or equity claim to possess the exclusive right of dismissal. This view, moreover, is strongly supported by what subsequently took place; for when the question arose as to paying the Imam a fixed stipend, an arrangement was made by which twelve members of the congregation guaranteed between them £6 a month for the purpose, and of these twelve guarantors Aloo Khan admits that five, and the plaintiff Hessen says that six, were members of the Malay community. I am, therefore, on the whole of opinion that, the Malays having shared in the erection of the Mosque

having shared in the election of the priest, and having shared in paying him his stipend, have by these facts established their right of joint control and the necessity for their concurrence, as members of the congregation, in such a step as the dismissal of the priest. I think that the defence raised to the present action, which has been set on foot by Aloo Khan and those about him, may at all events without overstating the case be supported by the observations of the CHIEF JUSTICE in the case of *Merriman vs. Williams*, Foord's Rep. at p. 172, where he says:—"No doubt by our law an agreement may be implied from the acts or conduct of a person without any express contract, and the Court will in all cases refuse to assist him in acting against or setting aside such implied agreement. Such an agreement may not be clothed with any binding legal force, so as to justify the Court in enforcing it at the suit of either party; but the Court will take cognizance of it as a ground of defence to an action brought by the person whose words, acts, or conduct have raised such implied agreement." And the view which I take of the present case also appears to be distinctly supported by the decision of the House of Lords in the Scotch Appeal case of *Cairncross vs. Lorimer*, to which the CHIEF JUSTICE in the same passage proceeded to refer. Taking this view of the case it becomes unnecessary, as already observed, to consider in detail the cases cited on behalf of the plaintiffs or to review the evidence as to what took place in August of the present year, when the so-called "deputation" to the defendant, consisting of Hadji Mahomet Pasha and Hadji Ally, informed the congregation that they had decided to have a Hanafite priest in order to "cool their hearts;" and when the defendant, after protesting against this decision, is said to have ended with an acquiescent "Bismillah." His own statement is that his acquiescence in the proceedings of the Indians was conditional on their proving that those proceedings were within their legal competence, and his subsequent conduct seems to prove pretty clearly that such was his attitude. It is sufficient to remark as to these matters that for the reasons stated the meeting of the congregation of August 15, to which the Indians only were summoned, must be held not to have

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been legally convened, and consequently both the appointment of the present plaintiffs as Vakheels, and the notice of dismissal given to the defendant by them, were irregular and *ultra vires*, and the plaintiffs have no *locus standi* to maintain the present action. It is possible that, as between the lessors and lessees, the arrangement made by the Indians with the Malays may give the former the right to determine the lease granted, on the ground that the property demised has not been used exclusively for the purpose for which it was appropriated. From the evidence of Mr. Currey it does not appear that there is much risk of the lessors taking up this position; but however that may be it cannot affect the rights of the parties now before the Court or our judgment on the issue which has been submitted to us. The judgment of the Court will be for the defendant with costs.

SOLOMON, J., after referring to the pleadings, said:—Such being an abstract of the pleadings, it is clear that the question to be determined is whether the Indian Mohammedan community, who are the lessees of the land upon which the Mosque is built, have the sole and exclusive right, without reference to the remaining section of the Mohammedan community, to dismiss the defendant from his office as Imam of the said Mosque. Now before considering this question, it will be convenient to set forth shortly the facts which appear to me to have been proved in evidence, and upon which there is considerable conflict between the witnesses for the plaintiffs and those for the defendant; and in doing so I shall endeavour not to enter too minutely into details. It appears that until the year 1885 there was only one Mosque in Kimberley, in Coughlan Street. This Mosque had been built by the Malays, but it had been used indiscriminately for religious services by Mohammedans of all nationalities, consisting mainly of Indians and Malays. Since about 1878 the defendant had officiated as Imam in the said Mosque to the satisfaction of the whole Mohammedan community. In the year 1885 the Indian section of the community, headed by Aloo Khan Arabi, resolved to separate themselves from the general



Mohammedan community and to build a Mosque of their own; and for that purpose they applied by letter of the 25th February, 1885, to the L. & S. A. Exploration Company for the grant of a site of land. This letter was signed by 100 persons describing themselves as Mohammedans belonging to Bombay in the Empire of India, but according to Hadji Rajap, one of the signatories and himself a Malay, there were about fifteen Malays amongst the signatories; and in any event, whether his statement as to the number is correct or not, it is clear that of these hundred persons a certain number were not Indians but Malays. After this letter had been written some further communications took place between the manager of the Company and Aloo Khan Arabi, as the representative of the Indian Mohammedans, and eventually a site was pointed out upon which they were authorised to construct their Mosque. Thereupon they immediately began to build upon this site, although the lease of the land itself was not actually executed until December, 1886. In July, 1885, when the walls were about six or seven feet high, the works came to a standstill for a short time. Aloo Khan says that this was for the purpose of allowing the walls to dry. Upon this point, however, as well as upon many other facts sworn to by this witness, I am of opinion that his evidence is unworthy of credit. I am satisfied upon the whole of the evidence that the reason of the stoppage was that the Indian community ran short of funds, and on that account were unable to complete the building. Under these circumstances it is proved to my satisfaction that Aloo Khan approached the defendant, and asked him for the assistance of himself and the Malays generally to complete the erection of the Mosque. It is not quite clear from the evidence that at this first interview Aloo Khan distinctly promised that if the Malays assisted they should be entitled to a joint interest in the Mosque. But however that may be, when the defendant was asked to assist, he told Aloo Khan that he could not do anything in the matter without consulting his congregation. Accordingly, on the following evening he called a meeting of the members of his congregation at his own house, at which there appear to have been from thirty to thirty-five persons

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present; and although Aloo Khan denies that he was ever at such a meeting, I am quite satisfied that he was there. As to what took place at the meeting we have the evidence of the defendant himself and several other witnesses, and although they do not all agree entirely as to the details of what transpired, I have come without any difficulty to the conclusion that Aloo Khan gave the Malays to understand that, if they would assist in the erection of the building, it would when finished serve as a Mosque for the general Mohammedan community and not for the Indians exclusively. Upon this understanding and in the belief that they would have equal rights with the Indians in the Mosque, the Malays agreed to assist both with money and with labour. Subscriptions were collected from them by Aloo Khan and others, and collections were made at the services towards the building fund. What was the exact amount of their contributions it is impossible to say, partly because Aloo Khan has lost the book in which were entered the sums of money which he received from the Malays; and in any case it appears to me that this is not a matter of much importance. But besides payments in money the defendant and other Malays contributed their labour as masons for a period of about two months until the building was completed; and this in itself was a very substantial contribution. Then there was a sum of £50 which had been previously given by Hessen, one of the Indian community, to the defendant for the purpose of building a Mosque for the general Mohammedan community, and as to which it is clear that there was no obligation whatsoever upon him to have devoted it to the purposes of this building, if it was to belong to the Indians exclusively. And generally, without going into too much detail, I am satisfied that the Malays in money and labour contributed a very considerable share of the cost of the Mosque, probably not much less than half. The building was completed about the end of September, 1885, and was opened for religious services immediately afterwards. On the day of the opening a feast was held at the house of Aloo Khan followed by a religious service in the new Mosque. At this feast the general Mohammedan community consisting chiefly of

Malays and Indians were present, and I am satisfied from the evidence that both classes contributed to the expenses. After the feast the whole community in a body adjourned to the Mosque and joined in a religious service. At the conclusion of the service Aloo Khan addressed the persons assembled in the Mosque. He told them that the building was now ready for use and that they should now proceed to the election of an Imam or priest. At the same time he submitted the names of three persons whom he considered fit and proper persons for the office, and asked them to select one of the three. I am satisfied that on this occasion Aloo Khan spoke in Dutch, though he swears that he did not know the language. Thereupon the Malays all shouted out "Imam Daout," and the Indians, upon the matter being referred to them in their own language, also selected Imam Daout. A man named Joseph then appears to have commenced to take down the names of those present, but he did not complete the list and there is nothing to shew what subsequently became of the document. After this unanimous election the defendant was asked to officiate in the new Mosque on the following day, which was a Friday and which in the Mohammedan religion corresponds to a great extent to the Sunday of the Christians. He, however, said that he could not do that as he had to officiate in the old Mosque. On the following day he conducted services as usual in the old Mosque, and after the service he announced from the pulpit that he had been elected as Imam of the new Mosque. According to the defendant he merely made this announcement to two persons whom he noticed in the congregation and who had not been present in the new Mosque when he was elected; while according to the plaintiffs' evidence the announcement was made to the whole congregation then assembled. It does not, however, seem to me to be of any importance which of these two versions is the correct one. That was the last occasion on which the defendant officiated in the old Mosque, and he was followed to the new Mosque by the whole of his former congregation. It is true that for about two weeks a very few of them continued to worship in the old Mosque, and that Hadji Rajap conducted service there during that time. At the end of

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these two weeks, however, the old Mosque was entirely deserted, and since that time it has been used as a Moham-  
 medan school for both Malay and Indian children. It was  
 about the end of September, 1885, that the defendant com-  
 menced his duties as Imam in the new Mosque, and since  
 that time the whole of the Mohammedan community have  
 regularly worshipped in that Mosque. Malays and Indians  
 jointly contributed to his support, and when in 1887 it was  
 decided that he should be guaranteed a salary of £6 per  
 month for twelve months, the twelve guarantors consisted, as  
 it appears, of six Indians, one Arab and five Malays. The  
 defendant then continued to conduct the services in the  
 Mosque with satisfaction to the whole of the community for  
 a period of nearly three years until the arrival of Sheikh  
 Mahomet in July, 1888. This man belongs to the sect of  
 the Hanafites to which the majority of the Indians also  
 belong; while the defendant and the majority of the Malays  
 belong to the Shafite sect. What the differences between  
 the two sects are does not appear from the evidence, but  
 apparently they must be very slight, as for the last ten  
 years the two sects have worshipped together in the same  
 Mosque, under one Imam, and have worked together in the  
 greatest harmony. It is alleged by the plaintiffs that  
 Sheikh Mahomet is a more learned man than the defendant,  
 inasmuch as he knows the whole of the Koran by heart, and  
 is acquainted with all the rules of prayer of the Moham-  
 medan religion, while the defendant is deficient upon both  
 these points; and they hold that according to Islamic law  
 it became the duty of the defendant when the Sheikh took  
 up his abode here to make way for him and to allow him to  
 officiate as Imam during his residence. A good deal of  
 evidence was led by the plaintiffs upon these matters, but  
 for the purposes of this case it does not appear to me to be  
 necessary to come to any decision regarding these questions  
 of Islamic law. Had it been necessary to do so I am bound  
 to say that I am not satisfied from the evidence and from  
 the authorities on their religion to which we were referred  
 that the contention of the plaintiffs is altogether well  
 founded. It is true that the authorities lay down that they  
 shall choose from amongst themselves the man most learned

in the Koran and the rules of prayer for their Imam, but I do not see that it follows from this that, when they have once made their choice, they are bound to accept as their Imam a more learned man who may have joined them after the election has been made. However, this is a point rather of curiosity than of practical importance in the decision of the present case. It is clear, however, that the defendant gave great offence to the Indian section of the community by not giving place to Sheikh Mahomet, so much so that they determined to compel him to make way for the Sheikh. It is said by them that their object at first was merely that he should give place to him temporarily; but as they explain that this meant for so long a time as the Sheikh remained here, and as he appears to have taken up his residence in Kimberley, it is clear that the defendant was really required to give up permanently his office as Imam in favour of Sheikh Mahomet, and that this was so also appears, as I am reminded, from the letter addressed to him by the plaintiffs' attorneys. Accordingly, a meeting of Indians was held on the 10th of August, at which it was resolved to appoint a deputation of two, viz. Hadji Ally and Hadji Mahomet Pasha, to wait upon the defendant and to make known their wishes to him. I need not enter into the details of what took place after this. The deputation went to the Mosque where the defendant was conducting service, and after the conclusion of the service they told him that they wished to change their Imam, and to appoint a Hanafite in his place. There is some conflict of evidence as to what the defendant then said, but in any event it is clear that he subsequently refused to resign his office at their dictation. Thereupon another meeting of Indians was summoned for the 15th of August. At this meeting the first thing that was done was to appoint the three Vakheels, the plaintiffs in this action, or rather perhaps to confirm their appointment, as they had already been acting in that capacity and had received a power of attorney from the original Vakheels so to act, whatever such a power might be worth. Thereafter a resolution was passed by a majority of fifty-eight to two that notice should be given to the defendant that his services as Imam were no longer required.

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 others vs. Daout.

This notice was duly served upon the defendant on the following day by the plaintiffs' attorneys, but the defendant refused to accept the resolution and notice as in any way binding upon him. Accordingly on the following day he repaired to the Mosque and conducted service as usual; and again on the 19th August he officiated as Imam. On these occasions Sheikh Mahomet was present and ready to conduct the service; and it is alleged by the plaintiffs that the defendant acted irregularly and improperly and that he went into the pulpit before the proper time in order to anticipate Sheikh Mahomet. It appears to me to be a matter of no importance as far as this case is concerned whether that was so or not. It is sufficient that the defendant did officiate as priest on these occasions after he had received notice of dismissal from the plaintiffs' attorneys, and that he still claims the right so to officiate; and the question which we have now to determine is whether his claim is well founded or not. It will be observed that in the abstract which I have given of the facts of the case I have in the main accepted the evidence given on behalf of the defendant where it conflicts with that of the plaintiffs. The plaintiffs are very unfortunate in that upon many of the most important facts of the case they have to rely upon the unsupported evidence of Aloo Khan, and as this witness is clearly proved in many instances to have deliberately stated what is untrue I attach very little importance indeed to his evidence when it is contradicted by that of credible witnesses. Men like Hessen and Hadji Ally gave their evidence in a most satisfactory manner, but unfortunately they were not present during the time when the Mosque was being built, and it is upon what took place during that period that in my opinion this case mainly turns. However, I have set out the facts as I believe them to have been established, and I now proceed to consider the questions of law which are raised in the case. Now in the first place, as it is admitted in the declaration that the defendant was duly appointed Imam of the new Mosque in 1885, and had continued to act in that capacity until August 15, 1888, the onus lies upon the plaintiffs to shew that he had ceased to hold the office on August 16, 1888, and that he has there-



fore no longer any right to officiate in the Mosque. The case set up in the declaration is that, at a duly convened meeting of the Indian Mohammedan community, it was resolved by a majority of fifty-eight to two to dispense with his services, and that upon receiving notice of such resolution his appointment as Imam was determined. Mr. *Frames*, however, in his argument went further than this, and urged that, the Imam being merely a tenant at will of the Vakheels or trustees, who are the lessees of the Mosque, they had the right summarily to eject him from the building irrespective of the wishes of the congregation; and in support of this contention he referred us to two cases which deal with the position of dissenting ministers, viz.—*Perry vs. Shipway*, 28 L. J. Eq. 660, and *Cooper vs. Gordon*, 38 L. J. Eq. 489. This, however, is a contention to which I cannot assent, even if it be admitted that the plaintiffs are the legal successors of the original Vakheels and that the Imam is in the same position as a dissenting minister. It is true that they hold the lease of the property, but they hold it in trust for the congregation; and they are bound to exercise the trust in accordance with the wishes of the congregation. As was said by TURNER, L.J., in the first of the cases cited, when referring to the trusts of the chapel, “These trusts would involve the appointment of a minister through whom divine worship ought to be performed; but this appointment was to be made not by the trustees but by the congregation for whose benefit the appointment was to be exercised.” And so also in the parallel case of the dismissal of a minister, this must be done not by the trustees but by the congregation for whose benefit the minister was to be dismissed. Consequently the mere fact that the Vakheels gave notice to quit to the defendant is not in itself sufficient to entitle the plaintiffs to succeed in this action. It was then urged that by the Mohammedan laws the Vakheels of a Mosque have the power to appoint and dismiss the Imam at pleasure. This is not the position taken up in the plaintiffs’ declaration, and I do not find that it is established by the evidence. Several witnesses were examined upon this point, but their evidence is by no means consistent, and the books upon

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Islamic law to which we were referred by these witnesses as the authorities for their statements do not appear to me to bear out the contention. These authorities lay down indeed that the founder of the Mosque has the right to appoint the Imam; but where there is no individual founder and where the church has been built by the congregation themselves, then I am satisfied on the whole of the evidence that the majority of the congregation have the right to appoint and dismiss the Imam. This, moreover, is in accordance not only with the case set up in the declaration, but also with the practice of this community as established by the plaintiffs' own evidence. When the defendant was appointed Imam in 1885 he was appointed not by the Vakheels but by the whole community; and when they purported to dismiss him from office they did so by resolution of the majority of the Indian Mohammedans. In the face then of the plaintiffs' own declaration, of the bulk of the evidence, and of the practice of the congregation, the contention that the Vakheels had the right of their own motion to dismiss the defendant from his office appears to me to be wholly untenable. This then brings me to the consideration of the main question raised in the case, viz., whether the defendant could be deposed by the Indian Mohammedans alone, or whether as contended for by the defendant it required a resolution of the majority of the general Mohammedan community duly assembled for that purpose. Now the plaintiffs' contention on this point is simply this: that, as shown by the lease of the land upon which the Mosque is built, the Mosque belongs to the Indian Mohammedan community alone; that although the Malays worshipped in the Mosque they neither had originally nor had they acquired any rights of administration; that the congregation consisted of the Indian Mohammedans alone, and that consequently a majority of the Indians had the right to dispense with the services of the defendant. Now undoubtedly the fact that the Indian Mohammedan community are the legal holders of the property is a strong point in their favour, but it is not conclusive. For if it can be proved that the Indian Mohammedan community have been parties to an agreement for the union of the two sections of the Mohammedans, the

Malays and the Indians, so as to form one united congregation, then, notwithstanding the express terms of the lease, the plaintiffs cannot now in my opinion be allowed to question the fact that the Malays form portion of the congregation, and have the right amongst other things to a voice in the appointment and dismissal of the Imam. Upon this point some observations which appear to me to be very pertinent to this case are to be found in the judgment of the CHIEF JUSTICE in the case of *Merriman vs. Williams*, Foord's Rep. 135, but I will not now repeat them, as they have already been quoted by the JUDGE PRESIDENT. Accepting the law then as there laid down, it will be seen that it is not absolutely necessary for the defendant to prove such facts as would entitle the Malays to come into Court as plaintiffs and to claim an alteration in the trusts of this Mosque; but it will be sufficient if he can prove that there was an agreement, either express or implied, between the Malays and the Indians for their union into one community and congregation. The case of *Cairncross vs. Lorimer*, of which unfortunately as is not infrequently the case we have no report in our library, is a very strong one, because there was no express agreement of any sort in that case; and yet the CHIEF JUSTICE holds that an agreement might fairly have been implied from the circumstances of the case. Now in the present case as I have already stated I am satisfied that an express agreement was made between Aloo Khan and the Malay community, which perhaps was not very precise in its terms, but which was sufficiently clear to debar Aloo Khan from now saying that the Malays do not form portion of the Mohammedan congregation which has worshipped in the new Mosque since its completion. It is urged on behalf of the plaintiffs that all that Aloo Khan promised was that the Malays should have the right to worship in the Mosque, but not that they should form part of the congregation or participate in the management. This contention, however, is inconsistent not only with the direct evidence of the witnesses called for the defendant but also with all the circumstances of the case and the conduct of the parties. It is common cause between the parties that all Mosques are free and open for the worship of all Mohammedans, so that

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it would have been wholly unnecessary for the Malays before contributing their money and labour to have stipulated that they should have the right to worship in the new Mosque. Moreover, why should the defendant and the Malays generally have come forward with money and labour to assist in the completion of a building, which was to form a kind of opposition Mosque for the use of a section merely of the old congregation? It is said that these contributions were given merely out of charity and brotherly love; but it is difficult to believe that the defendant's charity was so great as to have induced him to assist so substantially a number of persons who were practically seceding from his congregation. And if these contributions were given merely out of charity, it seems strange that there should have been so remarkable an outburst of charitable feeling at this crisis in the affairs of the Indian Mohammedan community; more particularly when we bear in mind that the Malays themselves had in contemplation the building of a new Mosque, as they had received notice from the L. & S. A. Exploration Company that their old Mosque encroached on the roadway and might have to be removed. On the whole I can come to no other conclusion than that the Malays gave their contributions on the distinct understanding that when the building was completed it would be the Mosque of the general Mohammedan community and not of the Indian Mohammedans exclusively. And this conclusion is further strengthened by what took place after the completion of the building. First of all a feast takes place at which the general Mohammedan community are present, and to which Malays and Indians subscribe indiscriminately. Then the whole community as one congregation take part in a common religious service in the new Mosque; and thereafter the defendant is elected Imam by the unanimous voice of the whole congregation. It is difficult to believe that this common action on the part of the Indians and Malays merely shewed the harmony and good feeling which existed between them at this time; and more particularly in the matter of the appointment of the Imam I cannot understand why the Indians, if they really believed that they alone had the right of electing the Imam, should have



allowed the Malays to have a voice in that election. Then what follows? The whole of the congregation, which had formerly worshipped in the Coughlan Street Mosque, migrated in a body to the new Mosque, for I do not think the fact that a few persons continued for a couple of weeks to worship in the old Mosque is one of any significance. Surely here again it is difficult to believe that the Malays would have in a body deserted their own Mosque, merely because a new Mosque happened to have been erected by a section of the old congregation of a different nationality from themselves. Rather I accept this fact as further evidence that Malays and Indians formed one united congregation which from this time forward worshipped in the new Mosque instead of in the old one. Thereafter for a period of nearly three years they continued to worship in this new Mosque as one congregation under the defendant as their priest. There is nothing whatever to shew that during the whole of that period the Indians exercised or claimed to exercise the sole rights of management and control of the Mosque. The Imam was paid by collections taken from the whole congregation, and when in 1887 it was resolved to guarantee him a salary of £6 per month, the guarantors consisted almost equally of Malays and Indians. How in the face of all these facts is it possible to come to any other conclusion than that the agreement set up by the defendant has been satisfactorily proved? But then it is said, even if Aloo Khan did make this agreement with the Malay community, there is no evidence to shew that he was authorised to make it by the Indian Mohammedan community. Now it is true that there is no direct evidence to shew that Aloo Khan was authorised by the Indians to go to the meeting at the defendant's house and to enter into any such agreement on their behalf. Such direct evidence would scarcely be procurable by the defendant, but I am quite satisfied from all the circumstances of the case either that Aloo Khan had such authority in the first instance or, if not, that the agreement which he made on that occasion was subsequently ratified by the Indian community. It must be remembered that Aloo Khan was the prime mover in the matter of the building of the Mosque. He it was who got the signatures

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to the letter to Mr. Currey applying for a site, who communicated directly with Mr. Currey about the grant of the land, who went about and collected subscriptions from the Indians, who engaged the workmen and supervised the building, who paid the accounts for labour and material, who eventually got possession of the lease of the land and who in short from first to last managed the whole business on behalf of the Indian community. And the Indian community appear to have been quite satisfied to leave the matter in his hands. Then when the stoppage came, and he secured the assistance of the Malays, it is impossible not to believe that what he did on that occasion was at any rate afterwards communicated to them, and that they approved of and ratified his action. Their subsequent conduct appears to me to establish this fact beyond any doubt. Their acceptance of the assistance of the Malays, the joint feast, the joint collections, the joint election of the Imam, the united congregation of worshippers, the joint guarantee, and all the other facts to which I have already referred more in detail establish to my satisfaction that, if they did not authorise the agreement, they at any rate were cognisant of it, and that they acquiesced in and ratified it. If then such an agreement as this was made between the Indian Moham-medan community and the Malays, it follows in my opinion that notwithstanding the terms of the lease the plaintiffs cannot be now heard to say that the Malays do not form part of the congregation who use the new Mosque as their place of worship. And if the Malays do form part of this congregation, it is clear, as I have already pointed out, that they are entitled to have a voice in the appointment and dismissal of the Imam. At the meeting at which the resolution to dispense with the services of the defendant was passed, no Malays were present, nor had any been summoned. Under these circumstances this resolution had in my opinion no binding force or effect, and the defendant was justified in ignoring it. He is still in my opinion the Imam of the congregation worshipping in this new Mosque, and is still entitled to officiate there. I have thus far based my judgment entirely upon the fact that an express agreement has been proved between the Indians and the Malays.

But even if I were not satisfied upon that point, I am not sure that the plaintiffs would even then be entitled to succeed in this action. My judgment has already extended to such a great length that I shall merely indicate shortly two or three other matters upon which it is not necessary for me to give a definite decision, but which it appears to me might very fairly be urged in favour of the defendant. In the first place, there is a great deal to be said in favour of the view that, apart from any express agreement, an implied agreement might be drawn from all the circumstances of the case to the effect that the Indians agreed to accept the Malays generally as members of their congregation. In the second place, it is clear that from the very first there were at any rate a few Malays belonging to the Indian community. Hadji Rajap and other Malays were amongst the original applicants for the site, and were some of the persons in trust for whom the land was granted by the L. & S. A. Exploration Company. Yet none of them were summoned to the meeting at which it was decided to dismiss the defendant from his office. Lastly, Mr. Currey's evidence that, if he had known that the Mosque had been erected by the Malays and Indians jointly, he would have insisted upon an alteration in the trusts of the lease is not without some significance. However, it is not necessary for me to discuss these matters at length, as I am satisfied that upon the agreement set up the defendant is entitled to the judgment of the Court with costs.

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COLE, J., concurred (*a*).

[Plaintiffs' Attorneys, CALDECOTT & PHEAR.  
Defendant's Attorneys, COGHILAN & COGHILAN.]

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(a) This judgment was confirmed on appeal by the Supreme Court on Feb. 11, 1889.

L. & S. A. EXPLORATION COMPANY *vs.* MULLER.

*Use and occupation.—Compensation for improvements.—*

*Pleading.—Set off.—Exceptio rei indicatæ.*

*A. sued B. for ejectment from certain land and obtained an order therefor conditional on the payment of a certain sum found to be due to B. for improvements. The order was not enforced and B. remained in possession. After some time had elapsed A. brought another action against B. for use and occupation and B. pleaded, and it was admitted, that the sum awarded him as compensation, which exceeded the amount of the present claim, was still unpaid, and at the hearing obtained leave to amend his pleading by adding a special plea of set-off. On these facts, the Court granted the defendant absolution from the instance.*

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—  
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Co. *vs.* Muller.

The plaintiff Company in this action claimed the sum of £36 for use and occupation of a certain stand at the rate of £2 a month, together with the sum of £13 12s. 6d. for rates paid on the defendant's behalf and at his request. The defendant in answer to this claim took the *exceptio rei indicatæ et litis finitæ* on the ground that the plaintiffs had previously, to wit in August, 1886, instituted a suit against the defendant in the Magistrate's Court of Kimberley in respect of the same premises, in which they claimed damages for trespass and an order for the defendant's ejectment, and the defendant made a counter-claim for compensation for permanent improvements. The Magistrate having given judgment for the plaintiffs for £10 and costs, the plaintiffs appealed to the High Court, which varied the judgment and made an order for the ejectment of the respondent on payment by the appellants of the value of the permanent improvements, and remitted the case to the Magistrate to determine the amount of such compensation, which amount the said Magistrate in pursuance of such order had fixed and determined at the sum of £150. The defendant pleaded that the said judgment so altered and amended as aforesaid was final and conclusive and of full force and effect, and

that the plaintiffs had not paid the said sum of £150 or any portion thereof, while the defendant had paid the plaintiffs the sum of £10 awarded by the said judgment as damages together with costs of suit, wherefore the defendant submitted that the plaintiffs were precluded from having and maintaining their present action, and prayed that it might be dismissed with costs. In addition to this special plea there were further pleas to which for the purposes of this report it is unnecessary to refer.

The case having been opened, the defendant admitted the use and occupation as alleged, and that the amounts were correctly stated in the declaration, while the plaintiffs admitted the allegations of fact contained in the special plea as above set forth. Both parties then closed their case without calling any evidence.

*Frames*, for the plaintiff Company, submitted that the effect of the former order was that the plaintiffs could not eject the defendant except on payment of the sum of £150, but they were not bound to proceed to ejectment, nor unless they did so to compensate him for the improvements. Meanwhile, so long as he remained in possession he was bound to pay for use and occupation as claimed. Moreover there was no plea of set-off, and if that was the defence it required to be specially pleaded.

*Feltham*, for the defendant, contended that, in order to secure payment of the compensation awarded, his only course was to remain on the premises until it was paid, and that, as the plaintiff Company had thus practically forced him to remain there, they were not entitled to recover for use and occupation. He referred to *Bellingham vs. Bloommetje*, Buch. 1874, 34, and *Anderson vs. Lindquist*, 4 H. C. 39, where it had been held that, where a plaintiff had obtained an order for ejectment on payment to the defendant of a certain sum as compensation for improvements, the defendant was not entitled to levy execution for the aforesaid sum; he also referred to a full report of the judgment on the facts in the above case contained in the *D. F. Advertiser* of March 30, 1886, from which it appeared that the Court had held that, in the absence of any tender of

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compensation for improvements, the plaintiff was not entitled to recover for use and occupation for the period previous to the action being brought. If the Court considered that the defence of set-off was not pleaded sufficiently explicitly, he would apply for leave to add a special plea to that effect.

*Frames* objected on the ground that the plaintiffs would be prejudiced by allowing the defendant to set up at this stage what was practically a new defence.

The COURT allowed the amendment, the costs of the special plea to be paid by the defendant.

LAURENCE, J.P.:—It may perhaps be safer for the special plea of set-off to be filed, and I do not think that in the circumstances of the case it can be held that the plaintiff Company will be prejudiced by allowing this course, since, even as the pleas originally stood and on the facts as admitted, it does not appear to me that the present action can be maintained. While the plaintiffs claim a sum of about £50 for use and occupation, and for disbursements made on account of the defendant, it seems that the defendant by a previous judgment has been awarded the sum of £150 as compensation for improvements effected by him while in occupation of the plaintiffs' land. The form of the judgment however was such that the defendant was not entitled to take out a writ for this amount, but the plaintiffs were granted an order for ejectment conditional on its payment, and this order has not been enforced. In these circumstances the defendant was apparently entitled either to sue for the recovery of this sum or to retain possession until payment (*a*). He has adopted the latter course, and I should certainly be disposed to hold that in consequence the plaintiffs would be entitled to charge him for mesne profits, or for use and occupation, and to set off the sum due on this account against the compensation previously awarded. However that may be, it is clear that the sum due from the plaintiff Company to the defendant largely



exceeds that which, on their own contention, is at present due from him to them. The present action is therefore at all events premature, and the judgment of the Court will be one of absolution from the instance, with costs.

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Nov. 15.  
—  
L. & S. A. Expl  
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SOLOMON and COLE, JJ., concurred.

[Plaintiffs' Attorneys, CALDECOTT & PHEAR.  
Defendant's Attorneys, COGHLAN & COGHLAN. ]

CALDECOTT AND OTHERS vs. BOTHA'S REEF G. M. Co.

*Computation of Time.—Joint-Stock Company.—Notice of Meeting.—Interdict.*

*Where the trust deed of a company required that "seven clear days' notice at the least" should be given of all meetings of shareholders, and notice was given by advertisement published in the newspapers early on a Tuesday morning of a meeting to be held on Tuesday afternoon in the following week: Held, that the necessary notice had not been given, and that the company must be interdicted from acting on certain resolutions passed at the meeting thus convened.*

This was an application for an interdict restraining the respondent Company, which was a gold-mining joint-stock Company, carrying on its operations in the Transvaal, but having its head office at Kimberley, and incorporated under the Companies Acts of the Cape Colony and the South African Republic, from carrying out the terms of certain resolutions passed at meetings of shareholders held at Kimberley on Nov. 6 and Nov. 15. It appeared from the affidavits that notice of the meeting, which was held on Tuesday, Nov. 6, was given by advertisements dated Oct. 29, and published in the two local newspapers on Tuesday, Oct. 30, and following days, the newspapers in question, as was stated, being published daily and circulated early every morning. The notice was in the following terms:—

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G. M. Co.

\* Botha's Reef Gold Mining Company, Limited.—An Extraordinary General Meeting of Shareholders will be held on Tuesday, Nov. 6

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at 3 p.m. at the offices of the Company to consider an offer received by the Directors for the reconstruction of the Company; or otherwise to decide as to the manner of liquidating the debts of the Company and raising an additional working fund; and to make the necessary alterations to the Company's trust deed in accordance with the resolutions which may be adopted at the meeting."

Clause 54 of the Company's trust deed was as follows:—

"Seven clear days' notice at the least, specifying the place, day, and hour of all Ordinary General or Extraordinary Meetings . . . shall be given, and in case of special business the general nature of such business shall be stated, either by advertisement or by notice sent through the post, or otherwise served as hereinafter provided."

At the meeting of Nov. 6 an offer which had been received by the Directors for the liquidation of the debts of the Company and providing further working capital was submitted to the shareholders, the proposal involving the increase of the nominal capital of the Company by creating 100,000 additional shares of £1 each. While this offer was being discussed, Mr. J. W. Philip, a shareholder, said that he thought he could get 100,000 new £1 shares taken up at 8s. per share, which was about the market price of the shares, thus in effect increasing the actual capital of the Company by £40,000, and as this offer was considered by the meeting to be more advantageous to the Company than the proposal submitted by the Directors, a resolution was passed "that this meeting be adjourned till the 15th inst. in order to receive an offer for fresh capital, and that the refusal be given of 100,000 new shares, for one week, to be given at 8s. per share to Mr. Philip on behalf of a syndicate." Notice of the adjourned meeting was advertised on Nov. 8 and the following days in the same newspapers, and on Nov. 12 the Directors received a letter from Mr. Philip, stating that he had disposed of the shares and was prepared to pay the £40,000 on receipt of the share certificates. At the meeting of Nov. 15 it was resolved to increase the capital of the Company by the issue of 100,000 share of £1 each fully paid up, and to amend the trust deed accordingly, and to issue the share certificates to Mr. Philip in terms of his offer and on receipt of the sum of £40,000 as agreed. The present applicants, as shareholders in the

company, delivered a written protest at the meeting of Nov. 15 against the passing of these resolutions, and now applied for an interdict on the grounds *inter alia* (1) that no valid notice was given of the intention of the Company to increase the capital or to issue 100,000 shares to Mr. Philip; (2) that it was proposed to issue £1 shares purporting to be fully paid up, whereas only 8s. a share was to be paid for them, which proceeding, as the applicants were advised, was illegal. Other grounds were also set forth in the petition and accompanying affidavits, to which however for the purposes of this report it is unnecessary to refer.

*Frames* (with him *Feltham*), for the applicants, argued that no valid notice had been given of the intention to propose an increase in the capital of the Company, and in the first place the notice was invalid in respect to the time of publication. While the trust deed required "seven clear days' notice at the least" to be given of all meetings of shareholders, notice of the meeting of Nov. 6 was first published on Oct. 30, which was only six clear days before the date of the meeting. In the computation of time for legal purposes the day must be reckoned from midnight to midnight, and both the day of the publication and the day of the meeting must be excluded from the reckoning. He referred to *Maxwell on Statutes*, 2nd ed., 422; *Buckley on the Companies Acts*, 5th ed., 456; *R. vs. Shropshire*, 8 A. & E. 173; *R. vs. Middlesex*, 14 L. J. M. C. 139; *R. vs. Aberdare Canal Co.*, 14 Q. B. 854, and other cases cited in *Fisher's Digest*, iv. 8323, 8324, *s.v.* "Time, computation of;" *in re Railway Sleepers Supply Company*, 29 Ch. D. 204; *Lawford vs. Davies*, 4 P. D. 61; *Queen vs. Allen*, Buch. 1879, 205; *Lotz vs. Saunders and Johnstone*, 1 Menz. 127. He was about to refer to the other objections raised when

The COURT, on the question of the date of the notice, called on

*Lange*, for the respondent, who said that the objection taken to the notice in the petition and affidavits appeared to be not with regard to its date, but that in substance it was

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—  
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not sufficiently specific. Apparently on the authorities there had been a technical failure to comply with the requirement as to "seven clear days' notice," but it was a mere technicality and it could not be contended that any one had been prejudiced thereby. It appeared from the affidavits that of the three applicants, one, Mr. Lowinsky, had only become a shareholder subsequent to the meeting; the second, Mr. Dunning, appeared to have disposed of all his shares; while as to the third, Mr. Caldecott, he only arrived in Kimberley on his return from England on Nov. 14, the day before the adjourned meeting. It was stated by *Buckley, ubi supra*, that "when the shareholders have in effect and substance had notice of a meeting, the want of observance of all formalities in respect of the manner of giving notice will not necessarily render the proceedings at the meeting invalid. At any rate, a member who was present at the meeting cannot question its regularity:" *In re British Sugar Refining Co.*, 3 K. & J. 408.

LAURENCE, J.P.:—This is an application for an interdict restraining the Directors of the respondent Company from acting on certain resolutions passed at meetings of shareholders in the Company held on the 6th and 15th inst. By these resolutions it was decided to increase the capital of the Company by the sum of £100,000, and to issue fully paid up £1 shares of that amount to Mr. J. W. Philip, a shareholder and the representative of a syndicate, on payment by him of the sum of £40,000, or at the rate of 8s. a share, which sum was to be applied partly to the liquidation of the debts of the Company, and partly to be employed as additional working capital. The validity of these resolutions has been impeached by the applicants on various grounds, but I do not think it necessary to go beyond the objection taken to the sufficiency of the notice by which these meetings were convened. If there was no proper notice of the meeting of Nov. 6 it follows that all the proceedings at that meeting, including the resolution to adjourn till Nov. 15, and the proceedings at the adjourned meeting held under that resolution, must be held to have been irregular and invalid. Was then due notice given of the

intention to hold the meeting of Nov. 6? Judging from the statements contained in the affidavits, the main ground of the objection taken by the applicants under this head appears to have been that the notice did not set forth with sufficient precision the objects of the meeting and did not cover the resolutions which were ultimately passed. But in addition it is alleged that this notice was published in the local newspapers on Oct. 30, "and not before," and that such was the case is admitted by the respondents. That being so, the authorities which have been cited shew clearly that a notice published in the morning of one Tuesday cannot be regarded as having been published "seven clear days" before a meeting held in the afternoon of the same day in the following week, while the trust deed of the company expressly requires that such notice shall be given "seven clear days at the least" before the date of the proposed meeting. In order to comply with this requirement, the authorities shew that it is necessary to exclude from the computation both the day on which the notice was published and the day on which the meeting was held; and applying that rule to the present case, it appears that only six, instead of seven, clear days' notice was given of this meeting. The respondents do not seriously deny the correctness of this contention, but urge that, even admitting the technical irregularity, no one has been shewn to be prejudiced, and that it is not open to the present applicants to raise this objection. There can however be no doubt that a provision of this kind must be considered, as the phrase goes, as imperative and not as merely directory; that compliance with it is a condition precedent to the validity of the proceedings at the meeting; and that if it is not complied with those proceedings must be regarded so to speak as "mere error," and that it is competent to any registered shareholder, such as undoubtedly Mr. Caldecott is, whatever may be the case with regard to the other applicants, to move the Court to restrain the Company from acting upon resolutions passed at a meeting thus irregularly convened. I do not think it can be held necessary to shew that any one was prejudiced by an irregularity of this kind; otherwise it would be easy to conceive cases where prejudice

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Nov. 22.  
—  
Caldecott and  
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Botha's Reef  
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1888.  
Nov. 22.  
—  
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might arise and yet, possibly owing to the very fact of the shortness of the notice, no one might be in a position to come forward and furnish positive proof that it had occurred. I think therefore that, without expressing any opinion on the other questions which have been raised, the objection to the validity of the notice must be regarded as a fatal one, and the interdict must therefore be granted as prayed, with costs.

SOLOMON and COLE, JJ., concurred.

[Applicants' Attorneys, CALDECOTT & BELL.  
Respondents' Attorneys, H. C. & J. C. HAARHOFF.]

### BUSHING vs. KINNEAR.

*Landlord's lien.—Attachment.—Possession of movables.—*  
*Act 20, 1856, Sched. B. § 52.—Interpleader.*

*J. K., a tenant whose rent was in arrear, removed her furniture clandestinely from the house she occupied. Immediately afterwards B., the landlord, obtained an order for its attachment, and it was subsequently attached at the place to which it had been taken. Afterwards B. obtained judgment and the goods were again attached in execution. They were then claimed in an interpleader by G. K., the son of J. K. It appeared that they had been brought on to the premises by J. K., and had there remained in her possession for a considerable time. G. K. produced no evidence corroborative of his claim and J. K. was not called to support it: Held, on appeal, that the claim had not been proved and the property must be declared executable.*

*Scumble, the original attachment was invalid, and there was no landlord's lien, the property having been actually removed before the order for its attachment was obtained.*

1888.  
Dec. 12.  
—  
Bushing vs.  
Kinnear.

This was an appeal from the decision of the Magistrate of Beaconsfield on an interpleader, arising out of the following

facts. Mrs. Bushing, the appellant, let a room to a Mrs. Kinnear, and in this room there was a suite of furniture of the ordinary kind—a table, sofa, chairs, bedstead, chest of drawers, etc. George Kinnear, the respondent, was the son of Mrs. Kinnear and lived with her on the same premises. After Mrs. Kinnear had occupied these premises for about a year, and a demand having been made by Mrs. Bushing for arrear rent, George Kinnear removed the above articles by night in what was admittedly a clandestine manner and in order to evade a writ. Immediately after the removal of the furniture Mrs. Bushing made an affidavit under § 52 of Sched. B to Act 20 of 1856, upon which she obtained an order for its attachment, and it was in fact attached a day or two after at the place to which it had been removed by G. Kinnear. Subsequently Mrs. Bushing obtained judgment against Mrs. Kinnear for the rent due, and the property was again attached in satisfaction of the judgment, and was then claimed by G. Kinnear on interpleader. The claimant swore that the property belonged to him and said he had purchased it about eight years ago at Beaufort West. He admitted that his mother had taken the furniture with her into the house when she hired it, that he had never told the landlady that it belonged to him and, as already stated, that he had removed it in order to evade an anticipated writ. The Magistrate held that the property belonged to the claimant and the judgment creditor appealed.

1888.  
Dec. 6.  
—  
Bushing vs.  
Kinnear.

*Frames*, for the appellant, argued that the property, although actually removed, and whether belonging to the claimant or not, was in the circumstances, and having been immediately followed up, liable to the landlord's lien for rent. He referred to *Grotius*, 2, 48, 17; *Board of Executors vs. Stigling*, Buch: 1868, 25; *Badock and Co. vs. Skeen's Trustees*, 5 Natal L. R. 192. He further contended that the claimant had failed to establish his right to the property, considering the suspicious circumstances of the case and the relationship between the parties. There was a strong presumption that the goods belonged to the tenant, and the claimant had produced no evidence to corroborate his bare

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assertion of ownership. [LAURENCE, J.P., referred to *Fivaz vs. Boswell*, 1 Searle, 235, and *Le Riche vs. Van der Hewel*, 4 H. C. 395.]

*Guerin*, for the respondent, said that the Magistrate had believed the evidence of the claimant and the Court, on the principle of *Le Riche vs. Van der Hewel*, should if possible sustain his decision. [LAURENCE, J.P.:—Why was not Mrs. Kinnear called?] She really would not have carried the case any further. As to the other point, the present case differed from *Board of Executors vs. Stigling*, in which the order for attachment was applied for before the actual removal of the goods. The point was really settled by *in re Price*, 3 Juta, 139.

LAURENCE, J.P.:—In this case we are asked to reverse the decision of the Magistrate on two grounds: firstly that, to whomever these goods belonged, they were as *invecta* liable to attachment and execution in satisfaction of the landlord's lien; secondly, that the claimant has failed to prove that they belong to him, and they were therefore, irrespective of the lien, rightly attached, and are now executable in satisfaction of the judgment obtained against Mrs. Kinnear. Now with regard to the first point, if it were necessary to base our decision on that ground, I should prefer to take time to consider the authorities which have been produced and others, such as *Voet*, to which I think we might have been referred. My present impression is that, the goods having been actually removed from the premises before the order for their attachment was obtained, they could not be followed up under the landlord's lien. By English law the right of the landlord in cases of distraint to follow up goods which have been removed, in certain circumstances and under certain conditions, is, I believe, created and regulated by statute; but I am not aware that there is anything corresponding to this in our own law. The ordinary and proper remedy for landlords to adopt in cases of this kind, where they have reason to apprehend the removal of the *invecta*, is to apply for an interdict against such removal pending an action to be brought for the recovery of the rent or else, in cases within the jurisdiction of the Magis-

trate, to make an affidavit and obtain an attachment, under the provisions of the Schedule to the Act of 1856, of the goods while still actually on the premises. My impression on this point is strongly confirmed by the citation of the recent case of *in re Price*, and the authorities which were there referred to, and which really seem to conclude the matter. But, however that may be, on the second ground I think our judgment must be in favour of the appellant. It is true that some difficulty arises from the fact that the Magistrate, after hearing Kinnear's evidence, decided in favour of his claim; but the evidence is very meagre and he has assigned no reason for the conclusion at which he arrived. It was the duty of the claimant to clearly prove his case; and a long series of decisions, beginning with the well-known case of *Fivaz vs. Boswell*, have established that in cases of this kind a strong presumption exists that movable property belongs to the person in whose ostensible possession it is found. I think it likely that the attention of the Magistrate was not directed to these cases or his decision might probably have been different. No receipts or other vouchers, in fact no corroborative evidence of any kind, was produced in this case in support of George Kinnear's assertion that the furniture belonged to him, and it is also a very significant fact that Mrs. Kinnear, in whose possession it had been for a considerable time, was not called in support of her son's claim. In these circumstances I think that the appeal must be allowed with costs and the property declared executable.

SOLOMON, J., in concurring, said that he thought the claimant had altogether failed to rebut the presumption that movable property belonged to the person who was found in possession of it.

COLE, J., concurred.

[Appellant's Attorneys, CALDECOTT & BELL.]  
[Respondent's Attorney, BADNALL.]

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—  
Bushing vs.  
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## BERNSTEIN vs. TAYLER.

*Principal and agent.—Sharebroker.—Custom of Share-market.*

*T., a sharebroker at Kimberley, bought certain shares on instructions from B., for which payment was to be made on their delivery from Natal. Shortly after the contract was made B. left Kimberley for the Orange Free State, leaving behind him certain dishonoured cheques and intending, as was alleged, to abscond and defraud his creditors. Criminal proceedings were taken against him and he was arrested and his extradition applied for. Meanwhile T., who alleged that by the custom of the market he had made himself personally responsible to the vendors in Natal, sold and delivered the shares to a third party in order to protect himself. B., however, returned to Kimberley before the arrival of the scrip, of which the market value had meanwhile considerably increased, and on its arrival demanded delivery: Held, on these facts, that B. was entitled to recover damages from T. for breach of contract.*

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The plaintiff in this action was a speculator and the defendant a sharebroker at Kimberley. On Oct. 12, 1888, the plaintiff bought through the defendant 206 shares in the Salisbury Gold Mining Company, and received the usual broker's note, which was annexed to the declaration, and from which it appeared that the vendors were Messrs. Payne and Dunbar, Pietermaritzburg. The purchase-price of the shares was £1467, i.e. 100 at £7 5s., and 106 at £7, and payment was to be made "on delivery from Natal within reasonable time." The declaration alleged that the shares in question were duly forwarded to the defendant for delivery to the plaintiff and were received by the defendant on Oct. 22. The plaintiff on that date was ready and willing to accept and pay for the shares, and applied for their delivery, but the defendant refused to deliver, and informed the plaintiff that he had already sold and delivered the said shares to other persons. The plaintiff alleged that this



sale was wrongful and improper, and without his knowledge and consent, and in violation of the defendant's duty as broker towards the plaintiff. The declaration proceeded to state that on Oct. 22 the market price of the shares in question had risen to £15 per share, and the plaintiff accordingly claimed £1500 as damages for breach of contract, together with general relief and costs of suit. The defendant in his plea admitted the contract and the receipt of the shares, and also that previous to their receipt he had resold them and received the price, which was substantially the same as that for which they had been purchased on account of the plaintiff. The plea went on to allege that on or about Oct. 14 the plaintiff absconded from Kimberley and betook himself to the Orange Free State in order to defeat and delay his creditors in obtaining payment of their debts, and leaving no funds to meet his liability with respect to the said shares, being also in a notoriously insolvent condition, and that before so absconding the plaintiff instructed the defendant to resell the said shares at the earliest opportunity. The defendant therefore justified the sale on the ground (1) of express instructions received from the plaintiff; (2) in the alternative, that he had acted as the plaintiff's agent and *negotiorum gestor* under the exceptional circumstances in the plaintiff's interests and to the best of his discretion; (3) that as the vendors of the shares resided in a different town from the buyer the defendant, in accordance with a custom prevailing among share-dealers, had entered into the contract in his own name and made himself personally responsible for its performance, "and was therefore justified in reselling the said shares to protect his own interests on the absconding and notorious insolvency of the plaintiff." The plaintiff excepted to the defendant's justification of his conduct on the ground of *negotiorum gestio* as being inconsistent with other portions of his plea, and also to that portion of the plea which set up a special custom as being bad in law, and unreasonable and inconsistent with the defendant's character and capacity as a broker, and also with the terms of the written contract annexed to the declaration and admitted by the plea. Subject to these exceptions, the plaintiff joined issue. The

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exceptions were set down for argument on Dec. 6, but as it appeared that they would not dispose of the whole question, and there would still remain certain questions of fact, and the case had been set down for trial on the following day, it was agreed, on a suggestion from the Court, that the exceptions should be argued if necessary at the trial.

Most of the facts proved in evidence so far as material will be found set forth in the judgment reported below. The plaintiff stated that having sold a "call" of 200 shares in the Salisbury Company, and having been called upon to deliver, he instructed the defendant on Oct. 12 to buy these shares to enable him to meet the call, and they were bought accordingly on the terms stated in the contract note. On the 14th he left Kimberley for the Free State, expecting to return on the 18th or 19th, before the arrival of the scrip from Natal, and in time to take it up, and in fact he returned on the 21st, and the shares arrived on the following morning, and he thereupon instructed his attorney to apply to the defendant for them. He was unable to apply personally as he was under arrest at the time. It appeared that on the day before he left Kimberley, the 13th, he had lost money in speculations, and had given some cheques which after his departure were presented and dishonoured. Proceedings were then instituted against him (which at the time of the trial were still pending) for obtaining money under false pretences, and he was arrested on a warrant and application made for his extradition. He stated, however, that he obtained leave to return to Kimberley in custody before the extradition proceedings were completed, and that he had never intended to abscond but had left for the purpose of obtaining a loan from a friend, but failed in this object owing to his arrest. The plaintiff also stated that before leaving he had instructed the defendant to sell a "call" of the shares on certain terms if obtainable but denied that he had authorised an absolute sale. The defendant on the contrary alleged that the plaintiff had authorised an absolute sale for cash, if it proved impossible to sell a call, but as to this allegation it was proved that when in the first instance he told the plaintiff's attorney, on a demand being made for the shares, that he had sold them, and the

latter replied that he had no right to do so without instructions, the defendant did not profess to have received such instructions, but said that he had effected the resale because the plaintiff had absconded and in order to secure himself. His attorneys also, in certain correspondence which had passed, took up the same position, and the defendant when under examination practically admitted that this was the motive for his conduct. The resale of the shares was effected on Oct. 18 at £7 2s. 6d., but on Oct. 22, when the scrip arrived, the market price had risen to from £13 to £14. Several brokers were called who gave evidence that, in cases where contracts were made with dealers not residing in Kimberley, the custom was for the brokers to make the contract by telegraph in their own name, and the broker for the vendor then forwarded the scrip with a draft attached for the purchase money, and this draft the purchasing broker regarded himself, if not in law at all events as a matter of good faith and for his own credit, bound to protect.

*Joubert*, for the plaintiff:—The defendant has failed to prove the alleged authority to sell, and it is clearly not a case of *negotiorum gestio*, as he admits that he acted in his own interests. As to the alleged custom, the question is whether the defendant on the contract he made was in law personally liable, and if so whether he was entitled to secure himself. The defendant had chosen to give the plaintiff credit and was bound to perform his contract on the due date when called upon to do so. As an agent it was his duty to act throughout with the utmost diligence in the interests of his principal.

*Frames*, for the defendant, said that the duty of an agent must depend on the circumstances in which he was placed. It was clear that when the plaintiff left Kimberley he had no *animus revertendi*, and he had therefore tacitly discharged the defendant from his mandate, and the latter, being personally responsible to the vendors, was then entitled to consider his own liability. He referred to *Story on Agency*, § 141; *Lacey vs. Hill*, *Scrimgeour's Claim*, 8 Ch. App. 921, and *ibid. Crowley's Claim*, 18 L. R. Eq. 182.

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*Joubert* replied.

*Cur. adv. vult.*

*Postea* (Dec. 10),—

LAURENCE, J.P., said:—The plaintiff in this action, a speculator at Kimberley, sues for £1,500 as damages for breach of contract. On October 12, the plaintiff bought through the defendant, a sharebroker, and who, as is admitted, acted as his broker in the transaction for due remuneration, 206 shares in the Salisbury Gold Mining Company, the terms of the contract being embodied in a broker's bought note in the usual form, which was delivered by the defendant to the plaintiff, and of which a copy is annexed to the declaration. This note, signed by the defendant and endorsed by him "as accepted by authority by wire," is in the following terms: "Bought on account of Mr. S. W. Bernstein from Payne and Dunbar, Pietermaritzburg, 100 Salisburys at £7 5s. 106 ditto at £7 = £1,467. Payment on delivery from Natal within reasonable time. Seller to pay brokerage, buyer to pay exchange and stamps." The plaintiff alleges that the shares in question were duly forwarded to the defendant by Messrs. Payne and Dunbar for delivery to him, and were received on Oct. 22. The plaintiff then requested delivery of the shares, being ready and willing to accept and pay for them and carry out the contract, but the defendant failed to do so, and informed the plaintiff that he had already sold and delivered the shares to a third party, the price received being slightly in excess of the purchase price on the original contract. The plaintiff alleges that this sale was effected by the defendant wrongfully and improperly, and without his authority, knowledge or consent, and in violation of the defendant's duty as broker towards the plaintiff as his principal, and that he has thereby sustained the damage which he now seeks to recover. The defendant admits the contract and the resale, but pleads that before this resale took place the plaintiff absconded from Kimberley and went to the Free State with intent to delay his creditors, and leaving no

funds to meet his liabilities, and being in a notoriously insolvent condition, and that before so absconding he instructed the defendant to resell these shares at the earliest opportunity. The defendant therefore justifies the resale on the ground of such express instructions from the plaintiff, or alternatively on the ground that he acted as the plaintiff's agent or *negotiorum gestor* under the exceptional circumstances of the case in the interests of the plaintiff and to the best of his discretion. He further pleads that "insomuch as the sellers of the said shares resided in a different town from the buyer, in accordance with a custom prevailing among dealers in shares in this Colony, the contract with the sellers of the said shares was entered into in the name of the defendant personally and he became personally liable to pay for the said shares, and the defendant was therefore justified in reselling the said shares to protect his own interests on the absconding and notorious insolvency of the plaintiff." The plea goes on to allege that after deducting charges of brokerage there was no profit on the resale claimable by the plaintiff. To portions of this plea the plaintiff before joining issue excepted, but it was agreed that these exceptions should be argued if necessary at the trial, and I do not think it necessary to now refer to them in detail. Now it appears from the evidence that on Oct. 12 the plaintiff instructed the defendant to buy for him 200 Salisbury shares, explaining that he had sold a call of these shares and the call had been made. By this it appears was meant, according to the phraseology of the share market, that the plaintiff in consideration of a certain payment in cash had given some person the right to demand delivery from him of these shares for a certain period and at a certain price. This right had been exercised, and the plaintiff was therefore obliged to deliver shares which he did not in fact possess, and accordingly instructed the defendant to buy. It appears that the defendant for his own protection at first asked the plaintiff to pay him the difference between the "call" price which he was to receive and the market price which he would have to pay. But he had had at least one previous transaction with the plaintiff, who was to some extent known to him, and in the end he

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did not insist on being secured in this manner and, the shares not being locally procurable, telegraphed an order for them to Payne and Dunbar, brokers at Pietermaritzburg, which order was executed and resulted in the contract the subject of this action. It appears that according to the usual custom in these cases the brokerage was paid by the vendor to Messrs. Payne and Dunbar and shared by them with the defendant, each receiving half per cent. The contract was concluded by Tayler here and Payne and Dunbar in Natal in their own names, each party in fact acting, as his correspondent it is stated would know, as agent for an undisclosed principal. After the contract had been completed by telegraph, Tayler sent Payne and Dunbar by post a bought note similar to that given to Bernstein and accepted in writing by Bernstein himself. Apparently, however, the scrip must have been forwarded before this note could have been received and, apart from the evidence of special custom—which was not very satisfactory or conclusive, and to the admissibility of portions of which objection might perhaps have been taken—apart from the evidence on this point I should be disposed to hold if necessary, on the telegrams put in, that the contract was in such a form as to make the nominally contracting parties personally responsible. If that be so, the defendant at this time had made two contracts, one with Payne and Dunbar and the other with the plaintiff as his agent, and both these contracts he was of course bound to perform. The contract having been made on the Friday, the 12th, the defendant alleges that on the following morning the plaintiff authorised him to resell the shares, the price of which appears so far not to have materially changed. The defendant, however, admits that what the plaintiff mainly wanted was to sell a call if possible at a profit, and he explained the reason, namely that the plaintiff wanted cash, and that the price paid for the call would have been paid in cash, while if the shares had been sold out and out nothing would have been paid till the arrival of the scrip. On the evidence I think that defendant has failed to prove that the plaintiff ever gave him express instructions to sell the shares. His own evidence on the point was very weak and unsatisfactory, and

it is not only positively denied by the plaintiff, but it is quite inconsistent with the tenor of the defendant's remarks in his subsequent conversation with Mr. Coghlan and also with the line of defence adopted, on instructions received from him, by his own attorneys in their letter which was put in, all of which facts taken together lead me to the conclusion that this allegation about express instructions was really an after thought, and that this portion of the plea has therefore not been substantiated. The next fact to be noticed is that on the following day, Sunday the 14th, Bernstein left Kimberley for the Free State in what to say the least of it were exceedingly suspicious circumstances. It appears that on the Saturday his speculations had turned out badly and after banking hours he had given cheques to the amount of about £400, which cheques on the Monday morning were dishonoured, he having in fact only a few shillings to his credit at the bank. He gives an explanation as to the provision he had made for meeting these cheques, but the explanation was a very vague and weak one. He also adds that he went to the Free State to raise money from a friend of his for purposes of speculation and that he had other assets elsewhere, which if time had been given him he would have been able to realise. However, when his cheques were dishonoured, criminal proceedings were taken against him, and are still pending, for obtaining money under false pretences, and he admits that among other proceedings he had, I think on the Saturday, sold certain shares for cash which he had bought and paid for with a cheque which was dishonoured. His friend in the Free State appears in the circumstances, as is not surprising, not to have seen his way to accommodate him with an advance; proceedings were taken for his extradition, but he says he voluntarily anticipated their formal course and returned to Kimberley in charge of a police officer, arriving here on Sunday, the 21st. The scrip now in dispute arrived from Natal early on the following morning, but had been resold in anticipation of its arrival on Thursday, the 18th, by the defendant, who had not then heard of the plaintiff's arrest, and did not contemplate that his creditors would so shortly be gladdened by again perceiving the light of his

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countenance. That the plaintiff's sudden departure from Kimberley in all the circumstances might fairly be described by the word "absconding" seems difficult to deny, and, while I am anxious to avoid prejudging any question which may have to come before another tribunal, it certainly seems exceedingly doubtful whether, if the criminal law had not been brought into play, the plaintiff would have returned to Kimberley, as he alleges was his intention, before these shares arrived from Natal. Now the above being a brief and I trust unprejudiced description of the material facts proved in evidence, it remains to apply the law to them and to consider whether they substantiate the defendant's pleas and afford a valid defence to the present claim. The first plea, that of an express authority to sell, I have already disposed of. As to the allegation that the defendant's proceedings were justified as a *negotiorum gestio*, very little need be said, and it was not seriously argued, for it is perfectly clear that the defendant's conduct in the matter was not dictated by a desire to protect the interests of the plaintiff but to protect himself. He admitted this to Mr. Fleming, and he also admitted in reply to the Court that he had acted as he did for his own protection and would have done the same even in the absence of the authority alleged to have been received from the plaintiff. Then we come to the last plea, which in effect comes to this, that, because the defendant had chosen to make himself personally liable to a third party, he was justified in the circumstances in saving himself by throwing overboard his own principal, to whom, however, according to the principles of the law of agency, his duty and obligation was of the strictest possible character (see *e.g. Page, N.O., vs. Ross, 2 App. Cas. 52*). What are the circumstances on which the defendant can rely as affording a legal justification for his failure to perform his contract? Not surely the mere fact that the plaintiff had left Kimberley; not the mere fact that he was brought back by a policeman, or that he had left behind him certain dishonoured cheques; not even as it seems to me all these circumstances taken together. It is true that they may have rendered it very improbable that the plaintiff would return in time to claim the fulfilment of

his contract; they may have even rendered the defendant's conduct, in acting on the assumption that no such claim would be made, not unreasonable from the point of view of a business man who of two risks elects to incur that which he regards as the least serious. But what had happened, as between principal and agent, to disentitle the former from claiming the benefit of the contract he had made from the latter, who had voluntarily undertaken any risks which it might involve? I will go further and take the illustration which I suggested during the argument,—supposing the plaintiff had died or his estate had been sequestered, between the date of the contract and the date for its performance, what defence could there have been against an action brought on this contract by his legal representative? Suppose for instance Mr. Fleming, the unfortunate recipient of one of these dishonoured cheques, had, on the disappearance of the plaintiff, obtained an order for compulsory sequestration, and a trustee had been elected. Upon the arrival of the scrip, surely the trustee would have had an action for its delivery or for any damages which the estate could be shewn to have sustained owing to the defendant's failure to deliver. It is true that the insolvency of a principal terminates the mandate of his agent as to future transactions, but I am not aware that it has ever been held to be a defence in a case like the present against the non-performance of an executory contract and no authority it was admitted could be produced for such a proposition. As to the English cases cited, they do not assist the defendant but rather the contrary. They were both cases arising out of the speculative transactions of Sir R. Harvey, which were terminated by his suicide and the suspension of his bank at Norwich. These cases were in part decided on the rules and regulations of the London Stock Exchange, and so far are not directly applicable. In *Crowley's Claim*, for instance, L. R. 18 Eq. 182, the contract notes were "expressed to be subject to the rules and usages of the London Stock Exchange," and on this fact the late Master of the Rolls expressly based his judgment. But, in so far as these decisions were based on the general law of principal and agent, they are distinctly against the defendant. In *Seringeour's*

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*Claim.* 8 Ch. App. 921, the stock was sold by the brokers without express instructions after Sir R. Harvey shot himself, and the brokers, who were personally responsible, being apprehensive of a further fall in the market. JAMES, L.J., said :—“ If the closing of the account had resulted in any loss to him, possibly it would have been a very good set off. The executors would have said, ‘ we owed you money, but you closed the account earlier than you ought to have done, and the result is you have exposed us to loss.’ There is, however, no such case made here and no loss arose to them through the closing of the transaction on the 16th, 18th and 19th, instead of on the 28th July ;” and MELLISH, L.J., said :—“ I am not aware that there is any difference between the purchase of stock or shares and the purchase of wheat or cotton. If a broker has purchased a quantity of cotton, or other goods, and has paid for it out of his own money, and has got an order from his principal that he may sell for the purpose of recouping himself the amount which he has actually paid, but the principal has told him, ‘ I think you had better not sell till the 1st of August,’ and he, being afraid the market will fall, sells a fortnight too soon, that, upon the ordinary principles of law, would not entirely deprive him of his right to recover. He would still be entitled to recover the money he had laid out on behalf of the principal ; but the principal would have a counter-claim against him for damage, if any, which might have resulted from the fact of selling a fortnight earlier than he ought to have done. But if it turned out that the market kept continually falling during the fortnight, so that the sale was in fact a gain to the principal’s estate, in that case there would be nothing to recover.” And these observations were expressly referred to and adopted by JESSEL, M.R., in *Crowley’s Case*. The fact is that the present is one of those hard cases which if Judges are not careful are apt to make bad law. The defendant, in the circumstances in which he found himself, ran the risk of his principal demanding the performance of the contract. If the shares meanwhile had fallen, I feel no doubt that the plaintiff neither would nor could have performed it. It was an aleatory contract, or what is commonly called a gambling



transaction, which the defendant chose to undertake as agent on behalf of a speculator with no capital at his back in the event of the transaction resulting in a loss. In point of fact, it resulted in a profit, and when the scrip arrived the plaintiff was ready and willing to receive and pay for it, or, what came to the same thing, he instructed the defendant to resell and credit him with the balance on the two transactions. He now claims damages owing to the defendant's failure to do so; and it is no defence for the broker to explain that he had already sold the shares to some one else in order to secure himself. As to damages, very little need be said, as it was agreed during the argument that if the plaintiff recovered they should be fixed at the sum of £1,200, which represents as nearly as possible the difference between the contract price, say £7 2s. 6d., and the price at the time of the breach, say £13 2s. 6d., after deducting the usual one per cent. commission on the resale which the plaintiff on Oct. 22 instructed the defendant to effect. There will therefore be a judgment for the plaintiff for the sum of £1,200. In the peculiar circumstances of the case I hope that we shall not be asked to make any order as to costs.

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SOLOMON and COLE, JJ., concurred.

*Joubert* said that the plaintiff would not ask for costs.

Judgment accordingly for the plaintiff for £1,200, no order as to costs.

[Plaintiff's Attorneys, COGHLAN & COGHLAN.]  
[Defendant's Attorneys, CALDECOTT & BELL.]

## FRIIS vs. BRITISH UNITED D. M. Co.

*Contract of Sale.—Delivery.—Dominium.—Rescission of Contract.*

*A mining Company agreed to sell to F., an engineer, two engines for a certain price, to be paid not in cash but in work and labour, and in effecting repairs to other machinery. F. then proceeded to remove some of the fittings of the engines, with the knowledge of the Company's manager, who, as F. alleged but as he himself denied, at the same time authorised him to remove the engines. Before he had done so, however, the Company discovered that F.'s execution of the repairs which he had in hand was unsatisfactory and inefficient, and accordingly declared the contract at an end. F. sued for the "restoration" of the engines, which were still on the Company's premises, and for damages for their detention. Held (SOLOMON, J., diss.), that the property in the engines had not passed. Held also, unanimously on the facts, that, assuming the property not to have passed, the defendants were entitled to rescind the contract and resist the claim for specific performance.*

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The plaintiff in this action, a mechanical engineer at Bultfontein, sued the defendants, a Mining Company at Dutoitspan, for the restoration of two engines or payment of their value and damages for wrongful detention. The declaration alleged that on or about Sept. 25, 1888, the defendants sold and delivered to the plaintiff certain two steam engines for the price of £200, of which it was expressly agreed that a sum of £60 10s. 0d. then due from the defendants to the plaintiff should be set off or taken in part payment, while the balance should be paid or liquidated by amounts to become due from the defendants to the plaintiff in respect of work and labour to be done thereafter by him for them from time to time at their request. After such sale and delivery as aforesaid had been completed, the plaintiff proceeded to remove the said engines from the defendants' premises, and did in fact remove a portion

thereof, and at the request of the defendants performed certain work and labour in part payment or liquidation of the said balance as agreed. Thereafter the defendant Company wrongfully and improperly retook possession of the said engines, and still retained possession thereof and refused to restore the same, and also refused to allow the plaintiff to carry out the agreement as he was at all times ready and willing to do, in consequence of which and of such wrongful detention by the defendants as aforesaid the plaintiff had sustained loss and damage, etc. To this the defendants pleaded, admitting the sale but denying the delivery of the engines, and stating that it was agreed that in satisfaction of the purchase price of £200 the plaintiff should in a workmanlike and efficient manner repair certain other engines belonging to the defendants and place them in a condition to perform their ordinary work. The plaintiff instead of doing this executed the repairs in question in a negligent, unworkmanlike and inefficient manner, so that the said engines, instead of being made capable of performing their ordinary work, were much damaged and rendered useless to the defendants. The defendants denied that any portion of the engines sold was removed with their knowledge, or that they were at any time delivered to the plaintiff, or that the work and labour performed by the plaintiff was in accordance with the terms of the said agreement. They admitted that they retained possession of the said engines and refused to deliver them but denied that the detention was unlawful or that the plaintiff had suffered damage as alleged. The plaintiff joined issue.

In support of these pleadings evidence was adduced by both sides at great length; but as the facts are fully set forth in the judgments reported below, a brief outline of its general effect will be here sufficient. It appeared that the plaintiff at the beginning of September was requested to give the defendants a rough estimate of the cost of putting certain machinery, including five engines, into repair and accordingly furnished such estimate, without however binding himself as to price, and was instructed to do the work. Among these engines was a hauling engine, which formerly belonged to the British Company, and a washing engine,

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formerly the property of the Eldorado Company, these two companies having shortly before been amalgamated by the defendant Company. The hauling engine among other repairs had to be supplied with new piston rings, while the washing engine required a patch on the crown-plate of the boiler. After the plaintiff had repaired the former, and while the latter was still under repair, a question arose with regard to two other disused washing engines, the property of the defendants and formerly belonging to the Eldorado Company. The plaintiff reported that it would cost a good deal to repair these engines, and a suggestion was made that he should take them over himself; and it was ultimately agreed, as admitted on the pleadings, that he should buy them for £200, the purchase price, however, not to be paid in cash but to be worked out by the plaintiff in repairing machinery, etc. The arrangement for the sale was made on behalf of the defendants by their claim manager, Mr. Scott, acting under instructions from their managing director, Capt. Macdonald; according to the plaintiff, Scott at the time of the sale asked him to take away the engines as soon as possible as they were lying in the road; but Scott, while admitting that he said something to this effect, stated that this took place at a subsequent interview, while Macdonald asserted that it was expressly arranged that the engines should not be delivered till the work contracted for was completed. A few days after the sale, the plaintiff went to the defendant Company's premises and removed the fire-bars and ash-pan belonging to the engines. On this occasion no representative of the defendants was present, but two or three days afterwards the plaintiff, accompanied by a cab-driver named Muller, went and removed some of the other fittings, such as lubricators, whistles, steam-gauge, spring balances and eccentric straps. He also obtained from Davis, the defendants' floor-manager, a donkey pump which he thought, but as it turned out erroneously, belonged to the engines purchased. While the plaintiff was unscrewing and taking off the fittings, Macdonald was present and a conversation took place as to the purport of which there was a great conflict of evidence. The plaintiff's version, in which he was fully corroborated by Muller, was that Macdonald

asked if he was going to remove his property and, on his replying "Yes," added "Take them away as soon as you can as they are lying in my road." Macdonald also remarked that he supposed the plaintiff was going to make £300 or £400 out of the bargain, to which he replied that he would be satisfied with less. Macdonald admitted having made this last observation, as a sort of joke, but wholly denied the correctness of the version given by the plaintiff and Muller of the rest of the conversation. He said that the plaintiff merely asked permission to remove the fittings to a place of safety, as such articles, when disused engines were left lying about, were apt to get lost or stolen, and that to this he assented, believing that the plaintiff intended to put them when unscrewed into one of the Company's sheds. He did not, however, raise any objection when he found they had actually been taken away, as it did not occur to him that this could amount to a delivery of the engines, which he had never intended to give until the plaintiff had performed his part of the agreement. With regard to the donkey pump, however, he did write and demand its return without delay, adding that "it does not belong to the engines you purchased," and the pump was returned accordingly. Before this time, but after the date of the sale, it appeared that Macdonald had reason to be dissatisfied with the plaintiff's repairs to the "British" or hauling engine, which since it was repaired had not worked in a satisfactory manner. Macdonald consulted a mining engineer, a Mr. Mercer, the chief engineer of the Griqualand West Company, as to the cause of this, and it was ascertained that it was attributable to the piston rings not fitting properly on the cylinder and consequently permitting steam to escape. New rings were then supplied by another mechanic and the engine had worked properly ever since. The plaintiff indeed admitted that there had been a mistake in the turning and fitting of these rings, which had been made round while the cylinder was oval, and agreed that the cost of replacing them by others should be deducted from his account. Almost immediately after he had removed the fittings, however, a more serious incident occurred, namely, the bursting of the

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boiler which had been patched, and of which the patch gave way on the first or second day after resuming work with the engine. The question of the cause of this was also referred by both parties to Mr. Mercer, who reported that the immediate cause was overheating, the result of a deficiency of water and of there being no water on the crown plate, and in consequence he considered that the plaintiff was not liable for the expense of again repairing the boiler, and accordingly it was subsequently repaired by workmen in the employ of the defendants. The investigation into the causes of this accident led, however, to the discovery, as alleged by the defendants, of such serious defects and faults in the plaintiff's workmanship as, taken in connection with the mistake as to the piston rings of the other engine, to render it necessary to terminate the contract with him and decline to allow him to do any more repairs on their behalf, while at the same time they expressed their willingness to pay him whatever he was entitled to for the work and labour actually done. The plaintiff, however, insisted on adhering to the original agreement and wrote through his attorney demanding "immediate delivery" of the engines purchased and threatening legal proceedings in default. The defendants in reply asked the plaintiff to send in his account, and to return the fittings removed, failing which legal proceedings would be instituted therefor as well as for damages to the Company occasioned by his bad workmanship. At the trial a large amount of evidence was taken as to the character of the plaintiff's workmanship especially with reference to the patch on the boiler. The effect of this evidence, as already stated, will sufficiently appear from the judgments of the Court. But it may be said generally that the plaintiff, while admitting that neither he nor the blacksmith to whom he entrusted the actual execution of the work had had much experience in boiler-making, asserted that the job, for the amount charged, was sufficiently well done, and would have served the purpose had it not been for the overheating which caused the accident. He denied that as alleged by the defendants the bolts were placed too near the edge of the patch, or too far apart from

one another, or that the bolts themselves were of an inferior quality. Other complaints made by the defendants were that the plaintiff had been negligent in using asbestos between the patch and the original metal instead of caulking, in using studs instead of rivets, in leaving an iron plug in the plate instead of inserting a lead or fusible plug, and in not testing up to a sufficient pressure after finishing the job. To this the plaintiff replied that he had tested up to 60 lbs., which in the circumstances was sufficient, and that he had specially informed the engine-driver that a fusible plug, which it was admitted would probably have avoided the accident, would be ready when required, and had asked him to send for it before beginning work, while as to the use of rivets and of caulking the position of the patch in the former instance and the shape of the plate in the latter were such as to render this impracticable. At the conclusion of the evidence

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*Guerin*, for the plaintiff, argued on the facts that there had been a delivery of the property, and the plaintiff, with the consent of the defendants' representative, had exercised acts of ownership over it. Moreover there was nothing in the plaintiff's workmanship to justify repudiation of the contract: *Chitty on Contracts*, 11th ed. 523.

*Frames, contra*, contended that nothing had taken place which amounted to a constructive delivery of the engines. Even if Scott, who was merely an agent for the sale, did authorise the removal of these things, that would not bind the Company: *Story on Agency*, §§ 126, 134; *Zeederberg & Co. vs. Bosman & Co.*, Foord's Rep. 37. [LAURENCE, J.P., referred to *Consolidated D. M. Co. vs. Cape D. M. Co.*, 1 H. C. 438.] As to the merits, there was ample evidence of the plaintiff's incompetence to perform properly his part of the agreement: *Addison on Contracts*, 8th Ed. 404, 405 and *Pothier*, note *in loc.* Although there was no alternative claim, the defendants were willing to pay the plaintiff whatever the Court might find to be due for work and labour actually performed.

*Guerin*, in reply, as to constructive delivery, referred to *Burge, Juta's Ed.* 132; *Savigny*, Erskine's transl. 6th

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Ed. 152. He also referred, as to the agent's authority and the right to repudiate, to *Chitty on Contracts*, 203, 677.

*Cur. adv. vult.*

*Postea* (March 14),—

SOLOMON, J., said :—The plaintiff in this action, who is a mechanical engineer carrying on business at Bultfontein, claims from the defendant Company the restoration of two engines or their value, and damages for their wrongful detention, or in the alternative he claims damages for breach of contract. The plaintiff's case is that on the 25th of September, 1888, the defendant Company sold and delivered to him the two engines in question for the price of £200, which price was to be paid not in money but in work and labour to be performed by the plaintiff for the defendant Company; that after such sale and delivery he removed a portion of the said engines from the premises of the defendant Company, and performed certain work for them in terms of the agreement; but that the defendant Company thereafter re-took possession of the engines, and refused to allow the plaintiff to carry out his agreement although he was at all times ready and willing to do so. The defendant Company admit the sale of the two engines for the sum of £200 but deny the delivery. They say that it was agreed that in satisfaction of the said sum the plaintiff should in a workmanlike and efficient manner repair certain other engines belonging to the defendants; but that the plaintiff failed to perform his agreement inasmuch as he executed the repairs in a negligent and inefficient manner. They deny that any portion of the engines was removed with their knowledge, and they now claim the right to retain possession of the said engines. Upon these pleadings it is clear that issue is joined upon several very important questions of fact, and the most difficult part of our duty in giving judgment in this case has been out of a mass of conflicting evidence to come to a decision as to what the facts of the case really are. Now naturally the first question to be determined is what were

the precise terms of the contract entered into between the parties, and on this point I cannot say that I feel much difficulty. It appears that Macdonald, the managing director of the defendant Company, entered upon his duties on the 1st September last; and seeing that there was a hauling engine belonging to the defendants which required repairing he consulted his claim manager, Scott, and by his advice early in September he sent for the plaintiff to ask him to undertake the repairs. In response to this request the plaintiff went to the premises of the defendant Company and undertook to repair the engine. A few days after, Macdonald, seeing that there were a number of other engines which required repairs, took the plaintiff round the works, pointed out four other engines to him, and asked him to give him an estimate of the cost of repairing these engines. The plaintiff examined the engines and gave Macdonald a rough estimate, which it is admitted on both sides did not in any way bind the plaintiff in his charges, but which was merely prepared as a guide for Macdonald. After receiving the estimate Macdonald instructed the plaintiff to put these four engines in good repair, and the plaintiff undertook to do so. On this same occasion Macdonald also pointed out to the plaintiff the two engines which are in question in this suit and asked him to see what repairs they needed. The plaintiff examined them and said that it would cost a considerable amount to repair them. He at the same time offered to buy one of the engines if Macdonald would let him have it cheap; but no agreement of any sort was come to on this occasion. A few days after the plaintiff again approached Macdonald with regard to the purchase of this engine; and it was ultimately agreed that the plaintiff should purchase the engine for the sum of £120, the price to be paid not in money but to be liquidated by amounts coming due to the plaintiff in respect of the work which he had undertaken to do on behalf of the defendants. Macdonald states that he further stipulated that the plaintiff was not to have the engines until the completion of his work; but I am not satisfied on the evidence that any such stipulation was made. And here I may at once say directly that I was not very favourably impressed by the manner in

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which Macdonald gave his evidence. Upon this particular point, which is a matter of such vital importance to the defendants' case, it does seem most extraordinary that no questions were put to the plaintiff in cross-examination, and I am disposed to believe that it was altogether an after-thought on Macdonald's part. I believe the plaintiff's evidence that upon this occasion nothing whatever was said on the question of delivery but that he merely agreed to buy the engine for £120. A few days after this, on the 25th of September, Macdonald sent Scott to the plaintiff to ask if he would not buy the two engines for £200 instead of one only for £120, the mode of payment to be the same, and after some negotiations the plaintiff agreed to this. The plaintiff further adds that on this occasion Scott told him he might remove the engines as soon as he pleased as they were in the way. Scott, however, who gave his evidence very fairly, states that this took place a few days afterwards and I think it is quite possible that the plaintiff may be mistaken on this point, and that Scott's version of the transaction is the correct one. I therefore come to the conclusion on the question of fact that the contract between the parties was that the plaintiff should buy the two engines for £200, the payment to be made in the manner already set forth, and that no stipulation was made at that time as to when the engines were to be delivered. Had the case rested there, then it is clear that the property in the engines would not have passed to the plaintiff, and that he could not have claimed delivery of the engines until he had performed his part of the contract. And here I may observe that it is a question whether such a contract as this could be called a sale within the strictly legal meaning of that term. One of the essential requisites of a sale is that the price must be certain and must consist of money. In this case the price no doubt was fixed, but it was not to be paid in money but to be liquidated by work. I am inclined to think that such a contract would more correctly fall under the category of the Innominate Contract *do ut facias*. However, whatever the name of the contract may be, the result in either case up to this point would be as I have stated. But the matter does not rest here, for according to



the defendants' own evidence two or three days after the conclusion of the contract Scott told the plaintiff that he might remove the engines at once. Now if Scott, the claim manager of the defendant Company, possessed the requisite authority, and if the plaintiff had thereupon gone to the defendants' premises and removed the engines, there could have been no question that such a taking possession of the engines by the plaintiff with the defendants' consent would have been a legal delivery. Such a delivery would in law have transferred the property to the plaintiff before the price was paid even if the contract is to be regarded as a legal sale. For if it was a sale, it was a sale on credit, and the property would pass immediately upon delivery though the price had not yet been paid. If the contract was not a sale but an innominate contract, the property would also have passed upon delivery. But upon this point it is sufficient to say that I agree with the contention of the defendants' counsel in his able argument that Scott had no right to authorise the plaintiff to take away the engines. He was merely employed by Macdonald to ask the plaintiff to buy the two engines for £200 instead of one engine for £120, and he had no power to go beyond the terms of his mandate. The sale and purchase of engines did not fall within the general scope of his duties as claim manager, and as he had no special mandate from the defendant Company to deliver the engines the permission given by him to the plaintiff to remove them would have no effect in law to pass the property. This, however, is a question of law which the plaintiff himself could scarcely be expected to have appreciated at the time. He at any rate believed that Scott had the right to authorise him to remove the engines, and accordingly he soon afterwards sent a man down with a Scotch cart to take away in the first instance some of the fittings. The man went down, took away the fire-bars and ash-pan and removed them to the plaintiff's premises. On this occasion neither Macdonald nor any of the other employes of the defendant Company appear to have been present or to have known what had taken place. Two or three days after, however, the plaintiff again sent his man down to fetch the rest of the fittings. On this occasion the

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plaintiff and Macdonald were both present, and there is a direct conflict of evidence between them as to what then took place. According to the plaintiff, who is fully corroborated by his cart driver, Muller, Macdonald upon seeing them there said: "I suppose you have come to remove your property." The plaintiff replied "yes." Macdonald said "I suppose you will make from £300 to £400 out of the sale?" Plaintiff replied "I shall be satisfied with less." Macdonald then said "Take them away as soon as you can as they are in the way." Macdonald's version on the other hand is that on this occasion the plaintiff came to him and said that as there were workmen about the engines the fittings might be stolen, and asked him if he might unscrew them and put them in a safe place; that he replied "Very well" and thought no more about the matter; that he thought the plaintiff was going to place them for safe custody in one of the defendants' own sheds; and that he did not discover that the plaintiff had taken them to his own premises until some time after. He denies that the conversation sworn to by Muller and the plaintiff ever took place, except that he admits that he did say to the plaintiff on one occasion that he supposed he would make £300 to £400 out of the sale. Now in my opinion it is of the utmost importance to ascertain whether the plaintiff's or Macdonald's version of what took place on this occasion is the correct one, and I am satisfied on several grounds that what the plaintiff has stated is substantially true. In the first place, as I have already said, I was not favourably impressed with Macdonald's evidence generally, whereas the plaintiff appeared to me to give his evidence in a fairly satisfactory manner. I therefore prefer where there is such a direct conflict of evidence to accept the plaintiff's statement of what took place, corroborated as it is by the evidence of another witness. And I do this the more readily because I do not think that the plaintiff is a man who would be able to appreciate the nice legal question which arises in this case with regard to the transfer of the property in the engines, and consequently would have no motive to colour or distort his evidence; whereas Macdonald on the other hand shewed while he was in the witness-box that he had a keen per-

ception of what constituted a legal delivery and transfer of property. But, apart from the credibility of the witnesses, it appears to me that the circumstances of the case generally support the plaintiff's version of what took place. For in the first place it is clear as I have already pointed out that the plaintiff, having received permission from Scott to remove the engines, thought that he had the right to do so, and before the occasion in question had already removed a cart-load of articles belonging to the engines. Why then should he have asked Macdonald for permission to unscrew the fittings and put them in a safe place? And if the unscrewing of the fittings was merely for the purpose of safe custody, why should he have sent his man to Davis, the floor-manager, to ask him for the spare fittings belonging to the engines? These spare fittings at any rate were safe enough in Davis's custody, and it is impossible to believe that he had at this time, before any difficulty had arisen, formed a deep-laid scheme to obtain a legal delivery of the engines. Lastly on this point, if he merely asked Macdonald on this occasion for leave to unscrew the fittings for safe custody, why should he have sent a man a few days afterwards to remove the engines themselves? In the second place, if Macdonald's version is correct, how is it that, when he wrote the letter of the 15th October asking the plaintiff to return the donkey pump which he had received by mistake from Davis, he said nothing about the removal of the fittings? He admits that at this time he knew that the plaintiff had taken the fittings to his premises, and yet on the 15th October he writes as follows:—"Please without delay return the donkey pump you removed from the Eldorado engine house. It does not belong to the engines you purchased and came from the British hauling engine." Surely it is not by any means a violent or strained inference to draw that, when Macdonald demanded the return of the donkey pump because it did not belong to the engines purchased, he tacitly admitted the plaintiff's right to take everything that did belong to the engines. And in any case if what he says is correct it does seem very strange that he should have said nothing whatsoever in this letter about the removal of the fittings. When asked in the

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witness-box to account for this fact, he at first replied that he did not think that the removal of the fittings constituted a delivery of the engines, and therefore did not trouble about them, which to my mind was a most unsatisfactory answer ; and upon being further pressed he said that the removal of the fittings was such a small matter that he did not think it necessary to mention them in his letter—not at all a probable or sufficient reason as it appears to me. It appears to me then that the facts to which I have drawn attention are strong corroboration of the plaintiff's version of what actually passed on the occasion in question. On the other hand there is one fact which certainly at the first blush appears to be rather in favour of Macdonald's version, and it is this. The plaintiff admits having on this occasion said something to the effect that the fittings might be stolen if he did not remove them. But this after all is not inconsistent with what the plaintiff has stated. He says that Macdonald saw him unscrewing the fittings, and it is quite consistent with the rest of his evidence that he should then have remarked to him that he was going to remove the fittings at once, as they were in danger of being stolen. I do not therefore think that this fact should outweigh the other circumstances to which I have drawn attention. It was also strongly urged on behalf of the defendants that it is extremely improbable that Macdonald would have parted with the property before the plaintiff had completed his work. I do not however think that this argument is of much value. Property is every day sold on credit and delivered at the time of sale, the seller trusting to the good name or position of the purchaser to pay the money on the due date ; and I cannot see much distinction between such cases and the present. In this case the defendants employed the plaintiff upon the recommendation of their own claim manager ; at the time of the sale they had no reason whatever for doubting his fitness or competency for the work ; why then should they have any hesitation in delivering the engines to him, believing, as they undoubtedly did at that time, that he would do the work and so discharge the debt ? I cannot see why it is more improbable that they should have trusted him to do the work,



which after all was quite a small job, than that a person should sell and deliver goods on credit, trusting to be paid at some future time. And in any case it is an undoubted fact that Scott gave the plaintiff permission to remove the engines at once, why then is it so improbable that Macdonald should have done the same? On the whole then, without discussing the matter any further, I am satisfied that the plaintiff's version of what took place on this occasion is substantially correct, and that Macdonald did give him permission to remove the engines. Then, if that be so, was there a legal delivery of these engines to the plaintiff? In my opinion there was. It is a well-established rule of our law that, in order to constitute delivery, it is not absolutely necessary that there should be an actual transfer of physical possession. Of course the most obvious and simplest form of delivery is where the article is passed from hand to hand, but it is clear that there are many cases in which this cannot be done. In the case of things of great weight or bulk, a mere symbolical delivery is held to be sufficient. Thus when corn stored in a warehouse is sold, the delivery of the key of the warehouse to the purchaser is taken to be a delivery of the corn. So also a delivery of logs of wood may be effected by the purchaser putting his mark upon the wood (Digest, 18. 6. 14. 1). And there may be even a more purely symbolical delivery than this, as in the case where both purchaser and seller are in sight of the property, and the seller declares that the purchaser may take possession (Digest, 41. 2. 1. 21). Thus in the present case, suppose after the sale Macdonald and the plaintiff had gone in presence of the engines, and Macdonald had pointed out the engines to the plaintiff, and told him that he might take them, that by our law would have been a good delivery. Thus Pothier, in his work on Sale, says in sect. 314: "In the case of things of great weight, the permission which the seller gives the buyer, or some one sent by him to carry them away, stands in the place of a delivery, provided the permission be given *in re praesenti*. The buyer, or other person sent on his behalf, before it becomes his duty to carry away the thing, is deemed by the permission given him to take possession of it *oculis et affectu*. So Savigny in his

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work on Possession, sect. 17, dealing with the prehension of moveables, says: "First of all here also, as with immoveables, personal presence is that which supplies the place, without any legal fiction, of an actual taking in the hand, and therefore it is quite immaterial whether the subject be actually handled, or whether it is capable at any moment of being so handled. The latter mode of Prehension is indeed the most usual when the subject is of such a size or weight as not to be easily moved from its place." Further the delivery of part of a thing is often deemed to be a delivery of the whole. Thus in *Hunter's Roman Law*, p. 136, the following case is quoted from the Digest (3.). 5. 6): "A agrees to allow B to take stones from his quarry. From the moment the stones are severed from the rock they belong to B. After some are quarried A and B have a dispute and A forbids B to carry the stones away. The prohibition is vain because B is the owner of the stones." So also *Burge*, Vol. III. p. 501, says: "The purchase of a specific subject or material, the price being paid, is without actual delivery effectually completed by such constructive possession as the case admits of, and this may take place successively without any necessity of the whole being completed." And again at p. 495 he says: "Whenever the delivery is necessarily protracted, and therefore interrupted, as of a cargo of corn, the delivery of a part is deemed a delivery of the whole." And *Voet*, 41. 2. 9. as usual puts the case very clearly as follows: "*Nec necesse est ut singulae rei partes apprehendantur, sed magis una tantum parte fundi apprehensa totus fundus censetur apprehensus; si modo et is, qui partem apprehendebat, totius acquirendi propositum habuerit, et alter, qui antea possederat, eius fuerit animi, ut rei totius amittat possessionem.*" Many other authorities might be cited, but I do not think it is necessary to multiply quotations on these points. Clearly, then, if the plaintiff's evidence is correct, not only was there a sufficient symbolical delivery of the engines to constitute a legal delivery, but there was an actual physical taking possession by the plaintiff of a part of the engines with the intention of subsequently, when it was convenient, removing the whole. For if Macdonald, seeing the plaintiff at the engines, said to

him "I suppose you have come to remove your property," and saw him actually unscrewing the fittings, then clearly there was that permission given by the seller to the buyer *in re praesenti* to remove the articles which is referred to by *Pothier*. And even if it is questionable whether these words were actually spoken, if, as I am satisfied, Macdonald allowed the plaintiff to remove portion of the engines, knowing that he intended thereafter to remove the remainder, and intending that he should do so, this would constitute a delivery of the whole of the engines as laid down by *Voet*. There having then been in my opinion a delivery of the engines, I am of opinion that the property passed to the plaintiff at that time. For if Macdonald delivered the engines to the plaintiff, or in other words allowed him to take possession of them, then clearly the delivery must have been made with an intention to transfer the ownership; and so the property in the engines passed from the defendant Company to the plaintiff. If upon this part of the case my brother Judges had arrived at the same conclusion as myself, it would have been unnecessary for us to consider any further question, for it is clear that the defendants in that case would have had no right to keep back the plaintiff's property, no matter whether or no he had performed his part of the contract. As the majority of the Court however finds that the property in the engines did not pass to the plaintiff, it becomes necessary to consider whether the plaintiff is entitled to maintain his action for breach of contract against the defendants. On this part of the case I do not propose to go into any detail. It is sufficient for me to state that, having had an opportunity of reading the observations of the JUDGE PRESIDENT upon that branch of the case, I fully concur in them. I think it is satisfactorily proved that the plaintiff did not perform his part of the contract, viz. the repair of the engines, in a workmanlike and efficient manner; and that the defendants consequently were justified in refusing to allow him to go on with the work. That being so, as he failed in his part of the contract, he cannot now come into Court and ask for damages for breach of contract against the defendants. His proper course would have been by action to recover a

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*quantum meruit* for the work and labour actually performed by him. There is no such count in the declaration, but the defendants expressed their willingness at the trial that the Court should fix the amount to which the plaintiff is entitled for such work and labour. This matter is fully dealt with in the judgment of the JUDGE PRESIDENT, and I will only add that I quite agree in the conclusion at which he has arrived on this point.

LAURENCE, J.P.:—In this case I have had the advantage of reading and considering the judgment prepared by my brother SOLOMON. As to a very great extent I agree with what he has said, I need not again go over the same ground, but it will be sufficient when dealing with those aspects of the case which he has fully discussed to indicate the reasons which have led me, with some regret, and not without some doubt, to differ from the conclusion at which he has arrived. There are two main questions which we have to decide. Firstly, has the plaintiff established, as alleged in his declaration, that there was not only a sale but also a delivery of the property of which he claims the restoration? In that case, if there was not only a sale but a delivery on credit, he is clearly entitled to have the property restored to him, and the defendants would be left to their ordinary remedy for any failure on his part to discharge his obligation to them. Secondly, if the plaintiff has failed to shew that the property has passed, is he entitled now to maintain his action for specific performance of the contract which admittedly was made? Now as to the first question, while the facts are such as may well give rise to a legitimate difference of opinion, on the whole I have come to the conclusion that the plaintiff has failed to establish that there was a completed sale. In order to establish this according to our law there must not only be a delivery, either actual or symbolical, but there must be an intention on the part of the vendor to transfer the ownership, and the purchase price must be paid or secured or credit given. As Grotius puts it, "with regard to delivery consequent upon the sale of movable property it is to be observed that it does not pass the ownership, unless the purchaser has paid the purchase

price or given security for the same, or has got credit from the seller for the amount" (Introd. ii. 5. 14, and cf. *ibid.* iii. 15, 4, and Van der Keessel, Th. 203). The circumstances of the contract in the present case were not such in my opinion as to make it *primâ facie* probable that it was the intention of the vendors to transfer the property sold until the plaintiff had substantially performed the services which were taken as equivalent to the purchase money; and although I agree in thinking it unlikely that Macdonald made any express stipulation, as he says he did, when it was at first arranged to sell the Wilson and Hartnell engine for £120, that the plaintiff was not to have the engine until the work was completed, nevertheless it appears to me that that would be the legal effect of the bargain in the absence of any stipulation to the contrary. The next fact in the case was the arrangement made by Scott with the plaintiff that the latter, instead of taking the one engine for £120 should take the two for £200, the price not to be paid in cash, but to be worked out in labour. I do not think it is proved that Scott on this occasion told the plaintiff he might take possession; but whether he did or not, it seems clear that he was merely authorised to arrange the price and, as has been pointed out, the defendants cannot in the circumstances be bound by what he did or said beyond the extent of his mandate. Undoubtedly however Scott, either then or, as I think more probable, shortly afterwards, did tell the plaintiff he could remove the property, and in fact invited him to do so as it was in his way; and it was in pursuance of this invitation that he went to the Company's premises and removed some of the fittings, apparently of both engines. With this object he went there twice, and on the second occasion he saw Macdonald, and there is a material difference between the plaintiff's version and that given by Macdonald as to what then took place. I am not disposed to differ from what has been said as to the plaintiff's manner of giving his evidence having been on the whole such as to inspire more confidence than that of Macdonald. At the same time I do not attach very much weight to the recollection of these witnesses as to the *ipsissima verba* of a conversation which took place a

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long time ago, and a considerable time before either of them could have been aware that any special importance was likely to attach to such details. For the same reason I cannot think that, where there is a conflict between these two witnesses, we ought to be much influenced by the evidence of Muller, the plaintiff's groom or cab-driver, for it seems extremely unsafe to accept the recollections of such a person of the details of a conversation in which he had no interest whatever, and to which he had no reason for paying special attention, as being likely to be entirely trustworthy or accurate. The main dispute is as to whether Macdonald did or did not ask the plaintiff whether he had come to remove "his property," *i.e.* the engines, adding that he was to take them away as soon as he could, as they were in the way. Macdonald totally denies having used these words, and as undoubtedly words much to the same effect were used by Scott, it seems quite possible that the plaintiff may have confused what was said by the claim manager with what was said by the managing director. It is true that as the plaintiff had already received permission from Scott to remove the engines, it seems rather unlikely that he should have afterwards asked Macdonald for leave to remove the fittings; but perhaps this may have been merely as a matter of courtesy, Macdonald happening to be on the spot, and in any case he admits that he did observe to Macdonald that if the fittings were not taken away they might disappear, cases of such disappearance being not unusual. When thus analysed, the discrepancies between the two versions of this conversation do not appear to me of very great importance; and in any event I think the case is one to which we must apply the maxim of the civil law, quoted by the CHIEF JUSTICE in *Treasurer-General vs. Lippert* (1 Juta, 291, and 2 Juta, 172): *In emptis et venditis potius id quod actum quam id quod dictum sequendum est.* On the whole, after giving my best consideration to the matter, I fail to see that either what was said or what was done on this occasion clearly proves that there was an intention on the part of the representative of the defendants to deliver this property on credit or that the property actually passed. It is true that shortly afterwards Macdonald demanded the return of the donkey-pump



as not belonging to the engines which had been purchased; but his tacit acquiescence, as indicated by this letter, in the retention by the plaintiff of the fittings, which he had regarded as removed for the purposes of safety, does not to my mind indicate any admission on his part of the plaintiff's right to take away the engines themselves. Such expressions must not be pressed too far against the parties using them, otherwise, so far as we are concerned with what the parties themselves understood at the time, the plaintiff might be embarrassed to explain how he came a few days afterwards to instruct his attorney to demand the "immediate delivery" of property which, as he now contends, had already been delivered to him. It may also be observed that Macdonald seems to have had a special reason for demanding the return of the donkey-pump, which would not apply to the other fittings, as the former belonged to the British hauling engine which was in use at the time. I was reading the other day a report of rather an interesting case in the Court of Appeal, in which the question was whether, where certain manufacturers of soda-water debited their customers with the value of the bottles and re-credited them on their return, the property in the bottles passed when the soda-water was sold. In this case Lord Justice BOWEN is reported to have said:—"The true rule was that the intention to part with the property was necessary. There was however this qualification, that one might so act towards the other as to produce in the mind of the other the belief that the property passed, though the vendor never intended it to pass, and the vendor would be precluded from afterwards asserting that it had not passed" (*Idris & Co. vs. Ward*, *Times Report*, Feb. 5, 1889). As to the necessity in our law, in order to pass the property, not merely of a delivery, but of an intention to transfer the ownership, it is sufficient to refer to *Hunter's Roman Law*, at pp. 138 and 139, and to the full discussion of the subject which will be found in the leading case of *Preston and Dixon vs. Biden's Trustee* (see 1 H. C. at pp. 306-310); but taking the most favourable view possible to the plaintiff, and accepting the observation of BOWEN, L.J., as applicable to our own law, I am still not satisfied that the defendants either intended to

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transfer this property or so acted as to be estopped from now asserting the contrary. I think the case is very like that of a man buying a horse, saddle and bridle, and afterwards, before paying for his purchase, removing the saddle and bridle, with the assent of the vendor, on the representation that it was desirable to put these articles in a safer place. I think it would be difficult to contend that such a transaction would shew a delivery by the vendor of the horse and an intention on his part to pass the property to the purchaser.

The remaining question is whether, assuming the contract of sale, as admitted on the pleadings, not to have been yet performed, the plaintiff is now entitled to an order for its specific performance. On this branch of the case I think we are all agreed. When a professional man, or a mechanic or other person presumed to possess a special aptitude for the performance of work of a particular description, undertakes to perform such work for reward, he is considered, as I pointed out during the argument, *praestare peritiam*, or in other words to warrant his own competency for what he undertakes to do. As to the law on this point, it is sufficient to mention the passage from *Addison on Contracts*, 8th ed. p. 404, which was cited during the argument, and the cases and authorities there referred to. Now applying this rule to the facts of the present case, I regret that I can come to no other conclusion than that the defendants have established their plea. What the plaintiff undertook was to put their machinery in good working repair; and when they found that his workmanship was bad and inefficient they were entitled and indeed bound, in justice both to themselves and to their servants, to put an end to a contract which he had shewn himself incompetent to satisfactorily carry out. Now first as to the hauling engine, during the progress of the case I was rather disposed to regard this as a minor matter which it was scarcely worth while to press; but after hearing all the evidence, I am bound to say that I think the matter of the piston rings, which was only discovered after the contract now sued on had been made, did in conjunction with other matters afford, as the defendants' counsel put it, cumulative evidence of the plaintiff's incom-

petence and bad workmanship. What seems to have happened is that these rings had to be fitted to an oval cylinder. Young, the plaintiff's turner, instead of making rings of a proper shape, made them round, and then Sumpton, another of his men, fitted them on, as he puts it, "nice and tight." The fact is that he jammed them on as well as he could, with the result that they were too tight in one place, so that in time they would have worn a groove in the cylinder, while elsewhere they did not fit closely enough, and consequently the steam escaped, and the engine failed to do its work properly, and ultimately the work had to be done over again by a competent mechanic, and at the cost of some delay and considerable expense. The main ground of complaint, however, is as to the patch put on the crown plate of the boiler of the other engine; and there can be no two opinions as to the nature of this patch, which—or rather all that was left of it—we had the advantage of seeing produced in Court. I do not propose to go into all the details of the evidence as to this piece of work; it is almost sufficient to say that while the defendants' expert witnesses can scarcely find words strong enough for their condemnation of it—Gander, who made the model which was produced of the manner in which the patch was joined to the original plate, speaking of it as a "disgraceful job," while French, who says "ditto to Mr. Gander," adds that "he never saw a worse"—while this is the language of the defendants' witnesses, those called for the plaintiff are almost equally successful in "damning with faint praise." Mercer, for instance, describes it as a "temporary job," and condemns the use of the asbestos, the absence of a lead plug, which the plaintiff omitted to supply but did not omit to charge for, and the absence of riveting. Then the other witness, Hasel, contented himself with describing it as a "third-class job," and from his manner left the Court to infer that the number of classes was three. Now it is quite obvious that no Company which had any regard for the efficiency of its machinery and the safety of its servants could allow its boilers to be dealt with in this manner. What the defendants complain of is that the work was handed over by the plaintiff to a blacksmith, with little

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previous experience of work of this description; that the bolts were too far apart and too near the edge of the plate, and that they were also of inferior quality; that asbestos was placed between the old metal and the new patch instead of the process of caulking being employed; that studs were used instead of rivets; that the plaintiff omitted to insert a fusible plug; and that when the work was done it was not tested up to anything like a sufficient pressure of steam. I will not say that each and all of these complaints have been substantiated, or that any one of them taken by itself would have been sufficient to justify the decision taken by the defendants when the patch gave way; and I see no reason to differ from the opinion of Mr. Mercer and other witnesses that the immediate cause of the accident was overheating, and that if this had not taken place, and if a proper plug had been supplied, the job might have lasted some months. But regarding the work as a whole, and taking it in connection with the matter of the piston rings, I can come to no other conclusion than that the defendants, in all the circumstances, were entitled to refuse to put any more of their work into the plaintiff's hands. At the same time, and although there is no alternative claim for work and labour done, they have expressed their willingness to pay the plaintiff whatever the Court may find to be due to him for such work as he actually performed. In assessing the value of this work I have felt some difficulty, as an account was only furnished by the plaintiff at a late stage of the case at the request of the Court; and although an opportunity was specially afforded to the defendants of examining the items in this account, before Captain Macdonald gave his evidence, he stated that he had not been able to do so with any minuteness. In these circumstances I should for some reasons have preferred to refer this account to some competent person, such as Mr. Mercer, to report on the items; but this would involve additional delay and expense, and from what was said I take it that both parties would prefer for the Court to fix a definite sum. In fixing this sum I should certainly have been very much disposed to disallow all the charges for the patch on the boiler, did it not appear that the parties had previously referred this



matter to Mr. Mercer and accepted his decision that, in the circumstances of the accident, the plaintiff ought not to be called upon to pay for the subsequent repairs. At the same time I certainly think that the plaintiff's charges under this head should be limited to the amount actually paid by him for materials and to Drieling for his work. There is also a sum of say £6 to be deducted for the piston rings and 17s. 6d. for the plug which was not received. On the whole I think that the plaintiff's account for £166 16s. 6d. must be reduced to £150, and that the judgment of the Court on the claim for the engines should be for the defendants with costs. I fear there can be little doubt that the costs will exceed £150 and that amount will therefore be set off against them. If the plaintiff is still in possession of the fittings which he removed, the defendants are entitled to have them back.

COLE, J.:—After some consideration I have arrived at the conclusion that my judgment must coincide with that of the JUDGE PRESIDENT. The case has been so fully gone into by my learned brothers that it is unnecessary for me to enter upon the details of it. The first question appears to me to be whether on the sale of the engines to the plaintiff there was an intention on the part of the defendant Company to pass the property in them at once to him without waiting for the fulfilment on his part of his obligation to do work for them of a value equivalent to the purchase price. Now it is clear that by our law there must be both delivery and intention to pass the property before the purchaser can claim that the *dominium* is in him. The JUDGE PRESIDENT has quoted what Grotius says on this point, and Schorer has a note on the passage cited which I translate thus:—"The buyer does not otherwise acquire the dominion unless he has paid the price to the seller, and this is true though the property may have already been delivered to the purchaser. Hence it follows that the *rei vindicatio* can be had against any possessor whomsoever." For this Schorer refers to Van Leeuwen's *Censura Forensis*, iv. 19, 20, and to one of the Dutch Consultations, saying, on the authority of the latter, "unless the seller has given the purchaser credit for the

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price," adding, however, on the authority of Carpzovius, "which again is insufficient if the seller has not yet delivered the property sold." Van Leeuwen in the passage referred to by Schorer says, "The vendor remains *dominus* of the property delivered until the price has been paid unless credit be expressly given, &c.," in regard to which he says, "Credit for the purchase money is never understood to have been given, so that the purchaser of the thing sold and delivered is constituted *dominus* of it, unless it be proved." It is clear, I think, from these passages that our law requires an absolute and distinct proof that a vendor expressly intended to divest himself of his property without the purchaser having previously paid the purchase price. The law will never presume that such was the vendor's intention; the purchaser must prove it. Has that been done in the present case? To my mind it certainly has not, and even if there are facts proved which give some colour to the contention that the engines in question were intended to become the property of the plaintiff the moment the bargain of sale was concluded, I should not feel myself justified in deciding that such was the case without more distinct and positive proof than has been adduced. But then it may be said, and has been argued, that although there may have been no proof of an intention to pass the property in the first instance, the subsequent conduct of the defendant Company was such as to shew that they did so intend. But here again I think the evidence falls far short of what the law requires. Scott, in my opinion, had no authority to deliver the engines or to authorise their removal. Macdonald undoubtedly possessed such authority, but he strenuously denies ever having exercised it, and although I agree in thinking that his evidence was not so satisfactory as it might have been, yet on the whole I incline to the belief that his version of what took place between himself and the plaintiff on the occasion of the removal of the fittings is nearer the actual truth than the plaintiff's own account. I say this with some reluctance, because I certainly do not wish to cast any imputation of intentional untruth on the plaintiff, who gave me the idea of an honest and straightforward witness. Like other men, however, his memory may occasionally be

at fault and it seems to me to be more than probable that it was so in regard to the occasion referred to. At all events he has not satisfied my mind, as the law requires that he should, that Macdonald intended expressly to make over the *dominium* of the engines to him on the day in question. As to the other matters in issue between the parties I agree with the conclusions arrived at by the JUDGE PRESIDENT (a).

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[Plaintiff's Attorneys, COGHLAN & COGHLAN.]  
[Defendants' Attorneys, CALDECOTT & BELL.]

### *In re* ESTATE OF SCHIFF.

*Insolvency.—Trustee.—Ord. 6, 1843, §§ 48, 52.*

*Where the trustee of an insolvent estate had left the Colony previous to the confirmation of his appointment, the Court, without making an order for his removal, directed a special meeting of creditors to be held for the election of another trustee.*

This was the petition of a creditor in the above insolvent estate, and set forth that at the second meeting of creditors one J. P. O'Reilly was elected sole trustee, but before he could be confirmed in his appointment he left the Colony for the South African Republic with the intention of permanently remaining there. On this being brought to the notice of the Court an application for Mr. O'Reilly's confirmation as trustee had been refused, and the petitioner now applied for an order on the Master to call and hold a special meeting of creditors for the election of another trustee or trustees to administer the estate. On the petition being read,

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The COURT inquired whether it was not first necessary to apply for the removal of the trustee already elected and referred to § 52 of Ord. 6 of 1843.

(a) This judgment was confirmed on appeal by the Supreme Court on June 18, 1889.

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*Feltham*, for the petitioner, submitted that this was unnecessary as the estate did not vest in the trustee until he was confirmed by the Court. He referred to sect. 48 of the Ordinance and *In re estate of Rothschild*, 3 H. C. 347.

The COURT made the order as prayed.

[Petitioner's Attorneys, H. C. & J. C. HAARHOFF.]

### WIGHTMAN *vs.* BEACONSFIELD MUNICIPALITY.

*Municipality.* — Act 45, 1882. — *Bye-law.* — *Publication.* — *Ultra vires.* — *Costs.*

*When a municipal bye-law has been approved and published, as provided by sect. 111 of Act 45 of 1882, it is not necessary in a prosecution for its contravention to adduce formal proof of such publication.*

*A bye-law rendering it an offence to disobey the directions of a Municipal Sanitary Inspector or other officer duly appointed was held not to be ultra vires as unreasonable.*

*A Municipality was empowered by one of its regulations to remove rubbish. The occupier of certain premises refused to obey the directions of a sanitary constable, given with a view to the exercise of this power, on the ground that he preferred to do the work himself, and for this refusal was convicted of contravening the aforesaid bye-law. On appeal, this conviction was confirmed but an application by the respondents for costs was refused.*

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Municipality.*

John Wightman was charged before the Assistant Magistrate of Beaconsfield with contravening sect. 88 of the Beaconsfield Municipal regulations, framed under Act 45 of 1882, by neglecting and refusing to comply with the directions of the Sanitary Inspector or other officer duly appointed, and preventing the contractor from removing certain rubbish and household litter from his premises at Beaconsfield, and persisting in removing the same himself after being duly warned not to do so by the officer aforesaid.

The bye-law in question is in the following terms :—

88. Any person who shall neglect or refuse to comply with, or disregard any directions of any Sanitary Inspector, or other officer duly appointed, shall, upon conviction, be liable to a fine not exceeding ten pounds, and in default of payment to imprisonment for any period not exceeding three months.

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Another bye-law, No. 143, provided for the removal of all accumulations of rubbish, &c., to certain sites set apart for the purpose, and went on to enact that "it may be optional with the Council either themselves to remove the same or to require the owners and occupiers jointly and severally of any property whereon such accumulation may be to remove it under the supervision of the municipal sanitary inspector," and in the event of refusal to do so when so required imposed certain penalties. The following bye-law, 144, provided that when such removals should be decided to be made by the Council, after public notice thereof, payments for such services should be made in accordance with a tariff which was appended.

The defendant, when charged before the Magistrate, excepted to the summons on the ground that the regulation was *ultra vires* and, the exception having been overruled, pleaded not guilty. The evidence was to the effect that the Municipality had appointed a contractor for the removal of rubbish and had given public notice to that effect and published the bye-law 144 for general information. The defendant, however, refused to allow the contractor to remove rubbish from his premises on the ground that he preferred to do it himself and had made satisfactory arrangements for the purpose. The contractor accordingly applied to the Sanitary Inspector, who sent a sanitary constable in his employ to the defendant's premises, and the constable, in presence of the contractor, directed the defendant to allow the latter to remove certain rubbish which was then there, but the defendant persisted in his refusal. The evidence for the defence was to the effect that the accused had made adequate arrangements for the removal of rubbish from his premises, which were kept in a clean and proper condition, and that in his opinion, and that of other ratepayers, the bye-law under which the Municipality claimed the exclusive

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right of rubbish removal was unreasonable and oppressive. On this evidence the Magistrate convicted and imposed a nominal penalty. The defendant appealed.

*Frames*, for the appellant, argued in the first place that the promulgation of the bye-law under which the charge was brought should have been duly proved, and in any case the bye-law was unreasonable and *ultra vires*. The sanitary inspector could not by giving directions create a crime in the event of non-compliance, while if the directions were for the performance of some duty or obligation specifically created by another bye-law or regulation, the charge should have been for contravening the regulation in question. Moreover the only order proved in this case had been given not by the Sanitary Inspector but by a constable, and it did not appear to have been directly authorised by the Inspector. He also pointed out that it was not proved that the respondents had given public notice of their intention to exercise the option of removing rubbish under sect. 143 of the regulations, the only regulation which had been shewn to have been published being that contained in sect. 144. On all these grounds he submitted that no offence had been proved and the conviction should be set aside.

*Joubert*, for the respondents, was not called upon.

LAURENCE, J.P. :—The appellant in this case was convicted of contravening sect. 88 of the Beaconsfield municipal bye-laws, which makes it an offence to “neglect or refuse to comply with or disregard any directions of any sanitary inspector or other officer duly appointed.” The first ground of appeal is that no proof was produced before the Magistrate of the promulgation of this bye-law, and it is contended that the *Gazette* in which it was published should have been formally put in. Now sect. 109 of the General Municipal Act of 1882, under which the Municipality of Beaconsfield was created, gives the Council of the Municipality power to make bye-laws for certain purposes, and by sect. 111 it is provided that “after any bye-law or regulation has been passed by the Council it shall be submitted for the approval of the Governor and if approved shall be published in the



Government *Gazette* and thereupon such bye-law shall have the force of law in the Municipality." In the event of a prosecution for the infringement of any bye-law or regulation it would no doubt be the duty of the Magistrate to satisfy himself that it had been duly promulgated as required by the Act and it would always be open to the person accused to shew that such was not the case. In the present case, however, it is not denied that this bye-law has in fact been duly approved and published, and the Magistrate appears to have had before him a copy of the municipal bye-laws, which is attached to the record, and which gives a reference to the date of publication of the various issues of the *Gazette* and the numbers of the Government notices in which from time to time they were severally published. That being so, and bye-laws so published having "thereupon" within the Municipality the "force of law," it appears to me that it was no more necessary to tender formal proof of their publication than it would be in a charge of contravening a public Act to put in the volume of the statutes in which it is published. I am under the impression that this point has been previously decided, and what was done in this instance was certainly in accordance with the usual practice in cases of this kind and I see no reason for regarding that practice as irregular or incorrect. The next objection taken is less technical and more important, namely that the bye-law in question is unreasonable and therefore *ultra vires*. Now the terms in which it is drawn are certainly very wide and might perhaps be described without exaggeration as sweeping in their character; but it must be borne in mind that the inhabitants of Beaconsfield have voluntarily placed themselves under this Act, and elected a Municipality with very extensive powers to make bye-laws, powers to which it is unnecessary to refer in detail but as to which it is sufficient to observe that to effectively carry out more than one of the purposes mentioned it would obviously be necessary to appoint a Sanitary Inspector, or some such officer, and to arm him with very considerable powers of supervision and control. Carrying out the principle, so popular and fashionable in these days, of local self-government, the local representative authority has passed this

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bye-law; it has been approved by the Governor in Council; and this Court therefore, according to the general principle applicable to such matters, ought not to invalidate it as unreasonable if it is possible to give it a reasonable construction and intendment. Now it seems to me sufficiently clear that what was intended by this regulation was simply to constitute disobedience to a lawful order given by the Sanitary Inspector, in his capacity as such, or by any other duly appointed municipal officer in that behalf, a punishable offence; and I am not prepared to hold that such a regulation is in itself unreasonable. There must necessarily be many matters connected with the sanitation of a Municipality for which it would be impossible for any regulations, however comprehensive, to make detailed provision, and as to which it does not seem by any means unreasonable to give an officer like a Sanitary Inspector some executive authority, or in other words to allow him to give directions and to provide the means for their enforcement. For these reasons the objection to the bye-law that it was *ultra vires* in my opinion fails. The next point taken was that it was not proved that the officer who gave the order which the accused refused to obey was either the Sanitary Inspector or a "duly appointed officer," within the terms of the regulation and *eiusdem generis* with the Sanitary Inspector. Now the officer in question is described in the evidence as a "sanitary constable," his duties being "in connection with sanitary matters" and the Inspector being his superior officer. It was also proved that he was sent with the contractor for rubbish removal to the premises of the accused and of other persons by the Sanitary Inspector to report on complaints made by the contractor; and that being so I am clearly of opinion that, even if the actual order given in this case was not directly given or authorised by the Inspector, still it was given by a duly appointed officer of the sanitary department acting within the scope of his duties as such. These points having been disposed of, there still remains the question whether the order actually given was in all the circumstances of the case a lawful order or whether the appellant was entitled, as he claims, himself to remove the rubbish which, as is admitted, was actually on the premises

at the time and which, as is also admitted, he did in fact, though required thereto by the constable, refuse to allow the contractor to remove. Now that it was lawful for the Municipality to make regulations for the removal of rubbish from occupied premises and to undertake such removal by its own servants or agents, and to charge a reasonable sum for such services, is clear both from the power in that behalf specially conferred by clause 13 of sect. 109 of the Municipal Act, above referred to, and also from the recent case of *Harvey vs. Beaconsfield Municipality*, 6 Juta, 4, where the point was expressly decided by the Supreme Court. Considering the number and ingenuity of the points which have been raised, I suppose it was in consequence of that reported decision that we were spared any impugnement of the validity of bye-law 143, published in the *Gazette* of March 24 last by Government Notice 249 of 1888. Now by this bye-law, of which I need not repeat the terms, it is provided that the Council may either remove rubbish themselves or require the owners and occupiers to do so under the supervision of the Sanitary Inspector, while by the following regulation it is provided that in the former case a certain tariff of charges shall be levied for this service. Now when the bye-law says that "it may be optional with the Council themselves to remove the same"—not I presume *in propria persona*—it clearly gives them the right to do so, and the evidence in this case shews that they have exercised this right and made an agreement with a contractor for the purpose. In these circumstances I think that the order given to the appellant in this case was a lawful direction, given by a duly appointed officer and for the purpose of carrying out the powers conferred on the Council by bye-law 143. It follows that it was an order disobedience to which rendered the person to whom it was given liable to the penalties imposed by bye-law 88. I am therefore of opinion that on none of the grounds which have been raised is the appellant entitled to succeed and that the conviction must be affirmed.

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SOLOMON, J.:—I entirely agree that this appeal must be dismissed, and I merely propose to make a few remarks

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upon two of the points that have been raised on behalf of the appellant. And first as regards the argument that bye-law 88 is *ultra vires*, though there is no doubt that the words of the section are very wide, still I think that it is our duty to read them in connection with the other regulations and, if possible, to place a reasonable construction upon them. And, if we do this, then it appears to me that the intention of the Municipality in framing the bye-law was to provide some penalty against persons who refused to comply with the lawful directions of the Sanitary Inspector while acting in the execution of his duty. That I think is the effect of the section, and if it be so construed then I cannot see that the bye-law is in any way *ultra vires*. If then the bye-law is not *ultra vires*, the question remains whether the order given by the Sanitary Inspector on this occasion was a lawful order given by him in execution of his duty. The order was that the appellant should allow the contractor appointed by the Municipality to remove the rubbish from his yard; and the question whether or not this was a legal order depends upon the meaning of sects. 143 and 144 of the bye-laws. Now I think that the general effect of these two sections taken together is that, when once the Municipality have decided to remove rubbish, no private person is justified in refusing to allow his rubbish to be removed by the Municipality on the ground that he intends to remove it himself. But then it is said if the Municipality do decide to remove the rubbish themselves, they are first bound under sect. 144 to give public notice of their intention. If that be so I am satisfied that Notice 229 published by the Municipality in a Beaconsfield newspaper and in a Kimberley newspaper, and which was put in at the trial, is a sufficient notice within that section. That notice intimates to the public that the Municipality have appointed a contractor for the removal of rubbish and fixes the tariff of fees to be paid for such removal; and it seems to me that that is ample notice to the public of their intention to remove rubbish. That being so, it appears to me that the order given by the Sanitary Inspector to the appellant was a lawful order given by him in execution of his duty, and consequently that the appel-



lant in refusing to comply with the order was guilty of a contravention of § 88.

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COLE, J., concurred.

*Joubert*, for the respondent Council, applied for costs, and the following authorities on the subject were referred to by Counsel and the Court: *Barling vs. Town Council of Cape Town*, Buch. 1875, 101; *Cornell vs. The Queen*, 1 Juta, 43; *Pickering vs. Kimberley Town Council*, 2 H. C. 374; *Grahamstown Municipality vs. Pote*, 5 E. D. C. 81. After argument,

The COURT held that there should be no order as to costs.

[Appellant's Attorneys, PLAYFORD & FITZPATRICK.]  
[Respondents' Attorneys, KNIGHTS & HEARLE.]

#### COLLECTOR OF CUSTOMS vs. MAREE.

*Practice.—Burden of proof.—Right to begin.—*  
*Act 10, 1872, § 54.*

*In an action for the forfeiture of a cart and horses used for the removal of smuggled goods, where the only defence pleaded was that the cart and horses had been so used without the consent or knowledge of either the owner or his agent: held, that the burden of proof of such absence of knowledge or consent lay with the defendant.*

This was an action for the forfeiture of a certain cart, harness and horses, the property of the defendant, and alleged by the plaintiff to have been with the consent of the defendant in the possession or charge of one Saul as conductor or driver thereof, and while in such possession to have been used with the knowledge and consent of the said Saul, within the meaning of sect. 54 of Act 10 of 1872, for the removal of certain goods liable to forfeiture, to wit, two bales of tobacco, which had been imported across the inland

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border into the port of Kimberley without payment of duty or permission from the Officer of Customs in charge of the said port as required by law. The defendant admitted the removal of the tobacco, and that it was liable to forfeiture as smuggled goods, and also that Saul was in possession of the cart, &c., with his consent, but pleaded that they were made use of in the removal of the tobacco without the consent or knowledge of either the defendant or the said Saul within the meaning of the said section of the Act.

SECT. 54 of Act 10 of 1872 provides that "All vessels, boats, carriages, and cattle made use of in the removal of any goods liable to forfeiture under any Act relating to the customs shall be forfeited, except it shall be shewn that the same were made use of in the removal of goods liable to forfeiture without the consent or knowledge of the owner thereof, or his agent or other person in possession or charge thereof with the consent of such owner."

*Guerin*, for the plaintiff, having opened the case,

The COURT suggested that, as the only question raised on the pleadings was that of the knowledge and consent of the defendant or his agent, the burden of proof under the section was upon the defendant and it was therefore for him to begin.

*Solomon*, for the defendant, submitted that as the exception was contained in the same section which created the forfeiture it was the duty of the plaintiff to negative the exception, as had been done in the declaration, and to prove the negative averment. He referred to *Queen vs. Forbes*, 2 H. C. 211: *Taylor on Evidence*, 7th ed., § 371. [LAURENCE, J.P., referred to *Queen vs. Emanuel*, 3 Juta, 72.]

The COURT held that by the section in question the burden of proof of absence of knowledge or consent in a case like the present was clearly thrown upon the defendant and it was therefore for him to call his evidence.

Evidence was then led to shew that Saul when he removed the tobacco did so at the request of one Scheepers,

who represented himself as acting on behalf of the police, and that, even if this was not the fact, Saul was under the *bonâ fide* belief that such was the case, and that therefore the case was not within the mischief of the statute; but after evidence had been called on both sides

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The COURT held, on the facts, that the defence had not been established and accordingly gave judgment for the plaintiff as prayed with costs.

[Plaintiff's Attorneys, GRAHAM, VIGNE & MALLETT.]  
[Defendant's Attorney, D. J. HAARHOFF.]

### TARRY & CO. vs. BROWN.

*Costs.—Magistrate's discretion.—Amendment of record.*

*T. sued B. in the Magistrate's Court on an account for work and labour. B. at the trial admitted his liability for certain items but disputed the rest of the account on the ground that the additional work had been necessitated by the plaintiff's own negligence. The Magistrate held that there had been negligence by both parties, necessitating the additional work, and on this ground gave judgment only for the amount admitted and ordered each party to pay their own costs: Held, on appeal, that the Magistrate had not exercised a judicial discretion as to costs and that, in the absence of any previous tender, the plaintiff was entitled to the costs up to the date of the defendant's admission of liability for the amount recovered.*

*An application having been made by the defendant for an order on the Magistrate to amend the record by inserting a statement made by himself, in reply to a question from the Court, to the effect that he had made the plaintiff certain offers for a settlement out of Court, and it appearing on reference to the Magistrate that this statement, which was denied by the plaintiff, had actually been made, but had not been recorded as being immaterial, the Court, holding that the statement did not in fact affect the*

*issue, refused the application but made no order as to the costs thereof.*

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Tarry & Co. sued Brown before the Magistrate of Kimberley for £13 1s. for work and labour, being repairs effected to a certain engine. The defendant at the trial admitted his liability for £5 2s. 9d., being the amount of the first three items in the account, but denied liability for the balance on the ground that the remaining charges had been necessitated through the negligence of the plaintiffs in performing the work represented by the amount admitted to be due. On this issue evidence was taken, and in the end the Magistrate gave judgment for the plaintiffs for £5 2s. 9d., and ordered each party to pay their own costs, stating as his reason for this judgment that he found there had been negligence by both parties. Against this judgment the plaintiffs appealed, but before the appeal was heard an application was made by the respondent for an order on the Magistrate to amend the record "by inserting the answer of the defendant to a question put by the said Magistrate, as to why the parties did not try and arrive at a settlement without coming to Court, the said answer being to the effect that he, the defendant, had often offered to pay the plaintiffs half the amount claimed by them in their summons." Contradictory affidavits having been filed by the parties on the question whether this statement had in fact been made, the Court desired the Magistrate to file an affidavit giving his recollection on the subject, whereupon he made an affidavit stating "that I did casually ask the defendant during the course of the trial why he had not attempted to settle the case out of Court, that his reply was as stated in his affidavit, but that I did not record it, as I did not consider it evidence affecting the issue or any plea of tender." The arguments on the application and appeal were then taken together.

*Solomon*, for the appellants, said that he would not go into the merits, as an intimation had been given to the respondent that the appeal was only on the question of costs. He submitted that as there was no tender the plain-

tiffs were clearly entitled to the costs up to date of plea. (Stopped *arguendo*.)

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*Frames, contra*, argued that the Magistrate had given an equitable judgment, and exercised a judicial discretion, with which this Court would not interfere unless "the Magistrate had made some glaring mistake:" *Marks vs. Esterhuijzen*, 3 Juta, 38. In the recent case of *Mosenthal Bros. vs. Brown* (H. C. not reported), where the Magistrate had made a similar order, and the circumstances were very similar, the Court had refused to interfere with his exercise of his discretion as to costs. Here the Magistrate had found for the defendant on the main question in dispute, and the decision on the merits was not challenged, and it was impossible to say that he had made "a glaring mistake" as to costs. Even if the plaintiffs were awarded costs up to date of plea, it would make no material difference in their favour.

*Solomon*, in reply:—Though not applying for an alteration in the amount of the judgment, we are entitled to refer to the merits so far as they bear on the question of costs. In the absence of "misconduct" a successful plaintiff is entitled to his costs and cannot be deprived of them: *Cooper vs. Whittingham*, 15 Ch. D. 501. [LAURENCE, J.P., observed that the Courts had taken a somewhat wide view of what was meant by "misconduct," as was shewn by the recent decision of the Court of Appeal in the case of the bankruptcy of Lord Colin Campbell (see 20 Q. B. D. 816), where it had been held that, the bankruptcy having been occasioned by a liability for costs incurred in an unsuccessful divorce suit, this amounted to "misconduct" within the meaning of the statute.] He also referred to the judgment of the CHIEF JUSTICE in *Meisserheimer vs. De Smidt*, cited by *Van Zyl on Costs*, at page 38; *Van Wyk vs. Faber*, 2 E. D. C. 152. A mere offer of a settlement made out of Court came to nothing unless there was an actual tender and production of the money.

LAURENCE, J.P.:—There are two matters with which we have to deal—firstly, the application made by the defendant for an amendment of the record in this case, and secondly

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the appeal brought by the plaintiffs against the decision. With regard to the defendant's application, the affidavit filed by the Magistrate shews that it was so far justified that the defendant was right in his assertion that he did make the statement which he complains was omitted from the record, and I am not prepared to say that in all the circumstances, and especially as notice had been given that the appeal was with regard to the question of costs, the application for an amendment was wholly unreasonable. As the Magistrate thought it worth while to put the question, it would certainly have been better if he had taken down the answer, for it is not always possible for a Magistrate, or even for a Judge, to be certain at the time when a witness makes a statement whether it will ultimately prove to be material or not. However, in the present case I think that the Magistrate, in the sequel, was right in his view that the answer in question did not, in the absence of any plea of tender, materially affect the issue he had to try, and this seems also to have been at the time of the trial the defendant's own view. That this was so is shewn by the fact that, as is expressly stated in the affidavits, he did not inform his own attorney of the attempt he had made to effect a settlement. Consequently the plaintiffs' witnesses were not cross-examined on the point, and they had thus no opportunity of giving their version of the alleged offer, and nothing was said about it by the defendant himself until, as the Magistrate says, the question was "casually" put to him by the Court. In these circumstances I do not think that the defendant could gain any practical advantage by the amendment of the record and the application must therefore be refused. As, however, it was not altogether an unreasonable application, and the plaintiffs' attorneys might very well have consented to it, instead of opposing it as they have done and filing affidavits denying, no doubt through a failure of recollection, that the statement in dispute was ever made, it will be refused without costs. I now come to the appeal by the plaintiffs, which in my opinion must be allowed. I think indeed that it is a fortunate circumstance for the defendant that a sort of *concordat* seems to have been established between the attorneys that the appeal should be



confined to the question of costs; for if we were to go into the merits undoubtedly very strong arguments might be adduced in favour of the right of the appellants to recover the whole sum for which they sued. The Magistrate, however, has only allowed the first three items of the account, and as the plaintiffs do not apply to the Court to increase the amount awarded to them it is not for the Court to go out of its way to do so. At the same time they have recovered judgment for a substantial portion of their claim and in the absence of any tender and in the ordinary course that judgment would carry costs. It has been urged in support of the judgment that the rules of procedure with regard to tender should not be too strictly enforced in actions in the inferior courts, but after all these rules have been laid down and this procedure created in order to prevent the practical injustice which as experience shews would ensue if there were not some such regulations for the conduct of legal proceedings. The Magistrate moreover says that he ordered each party to pay their own costs, not because of the alleged offers of a settlement out of Court, which he expressly states that he regarded, and I think rightly regarded, in the absence of a plea of tender as immaterial, but because he found there had been negligence on both sides. I confess I do not altogether follow him in his reasons for this conclusion and, in order to justify the result arrived at, he should certainly have gone on to find as a fact, which he has omitted to state that he did, that the alleged negligence on the part of the plaintiffs was the cause of the further expenses being incurred. But, assuming him to have been right on this point, this was a reason for reducing the plaintiff's claim to the amount of the first three items, which he did, but it was no reason whatever for depriving him of his costs as well. Neither do I find anything in the cases which have been cited, as to the reluctance of the Court to interfere with the exercise by Magistrates of their discretion in these cases, to justify us in upholding the present decision. The strongest case in favour of the respondent is undoubtedly that of *Mosenthal Bros. vs. Brown* in this Court; but in that case it was perfectly clear that the defendant was all along willing to

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pay the amount ultimately recovered; that the case only came into Court owing to the refusal of the plaintiffs to accept this amount and their attempt to enforce a further claim which the Court regarded as oppressive and almost extortionate in character; and that it was only through the defendant not having had the benefit of legal advice that, in the absence of a formal plea of tender, the plaintiffs escaped having to pay the main costs of the action. In these special circumstances the Court refused to interfere with the discretion of the Magistrate in making no order as to costs; but the circumstances of the present case appear to me to be of a widely different character. In *Mosenthal vs. Brown* the conduct of the plaintiffs might not unfairly be regarded as being such "misconduct" as to entitle the Court to deprive them of their costs, in accordance with the rule laid down by JESSEL, M.R., in *Cooper vs. Whittingham*; but there was certainly no such misconduct in the case now before us. Then as to the case of *Marks vs. Esterhuijzen*, which is very briefly reported, the Court seems to have gone on the broad ground that the appellant by the Magistrate's judgment "had received more than he was entitled to," apparently holding that the tender made by the defendant before action brought was a sufficient tender, in which case, had there been a cross appeal, any alteration which might have been made in the judgment as to costs would probably have been unfavourable to the plaintiff and, instead of there being no order as to costs, he would have had to pay the defendant's costs subsequent to the tender. I next come to the case of *Van Wyk vs. Faber*, 2 E. D. C. 152, where it was held, reversing the judgment of the Magistrate, that as the plaintiff had recovered more than was tendered, although the amount recovered was far less than that claimed, and although the summons had not been preceded by a letter of demand, the plaintiff was nevertheless entitled to the costs of the action. Mr. *Frames*, in his observations on the cases cited by Mr. *Solomon* in reply, pointed out that in this case the respondent was not represented on the appeal and suggested that the decision was erroneous; but, if I may be permitted to say so, the case appears to me to have been perfectly correctly decided and

it is an authority in favour of the right and duty of an appellate Court to correct the exercise by a Magistrate of his discretion as to costs, when, as the JUDGE PRESIDENT put it, "there are no principles of law which justify the Magistrate in refusing costs to the successful party." Similarly in *Meisserheimer vs. De Smidt*, in the Supreme Court in December 1880, the CHIEF JUSTICE is reported by Mr. Van Zyl to have said that "it was really a serious question whether a Magistrate should deprive a successful litigant of his costs. The plaintiff was successful, and there was no circumstance to deprive him of his costs, and he thought the Magistrate should not have made the plaintiff pay his own costs. The plaintiff would now therefore have his costs together with the costs of the appeal" (a). Similarly in England, where under the present Act costs follow the result unless the Judge at the trial, in the exercise of his discretion, "for good cause shewn," shall otherwise order, it has been repeatedly held by the Court of Appeal that though where good cause exists there is no appeal from the Judge's exercise of his discretion, nevertheless the question of the existence of good cause is one upon which an appeal lies, and it is necessary to prove its existence before a Judge can deprive a successful litigant of his costs. In the present case, for the reasons given, I am of opinion that there was no such good cause, and the appeal must therefore be allowed, with costs, and the judgment of the Court below altered into one for the plaintiffs for £5 2s. 9d., with costs up to and including the date of plea, the plaintiffs to pay any subsequent costs.

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SOLOMON and COLE, JJ., concurred.

[Appellants' Attorneys, H. C. & J. C. HAARHOFF.  
Respondent's Attorneys, FRAMES & GRIMMER.]

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(a) Cf. also *Ramsammy vs. Vincent Sam*, 2 H. C. 209, and cases there cited.

## LORD vs. O'LEARY.

*Election Petition.—Employment of Voters.—Personation.—Scrutiny. — Corrupt Practices. — Agency. — Constitution Ordinance.—Acts 21 of 1859, 14 of 1874 and 9 of 1883.*

*On an election petition which, the seat being claimed by the petitioner, involved a scrutiny, the votes of persons disqualified from voting, under § 35 of Act 9 of 1883, were struck off the poll, notwithstanding the provisions of sect. 50 of the Constitution Ordinance; but with regard to persons not entitled, under the provisions of sect. 10 of the said Ordinance, to be registered as voters or to vote, the register was held to be conclusive and the votes of such persons were therefore not struck off.*

*The employment of electors as members of a band or as cab-drivers is not in itself a corrupt practice, neither does it disqualify such electors from voting under sect. 35 of Act 9 of 1883.*

*Where a successful candidate after an election presented a voter, who had taken an active part in his favour by speaking at public meetings but who had not canvassed for him or otherwise acted as his agent, with certain shares as a “souvenir” of the election: held, that such presentation did not in itself amount to a corrupt practice, neither did it disqualify the recipient as a paid agent.*

*The surnames of certain electors were mis-spelt on the register: held, there being no doubt as to their identity, that their votes were good.*

*An elector can only vote once. Where certain electors, who were entitled to vote for four candidates, after giving one or more votes at one polling station, afterwards voted elsewhere, the later votes were struck off the poll.*

*A certain association having been formed in connection with the election, and having resolved to support certain candidates, and having given a “smoking concert” at which a number of voters were supplied with liquor and cigars: held, on the facts, that the agency of this association for the candidates whom it supported had not been*



*proved, and that therefore the entertainment in question did not amount to a corrupt practice by a candidate's agent.*

This was a petition under the Parliamentary Elections Act, 1883. The petitioner stated that he was a candidate at an election held on Nov. 13, 1888, for members to represent the electoral division of Kimberley in the House of Assembly, and he claimed to be returned at the above election, at which there were seven candidates for four seats, and Messrs. Barnato, Lange, Lynch and O'Leary had been declared duly elected by the returning officer according to the state of the poll, the number of votes as declared for Mr. O'Leary, the respondent, being 1034 and for the petitioner 1028. The Governor had subsequently proclaimed the aforesaid four candidates in the above named order to be duly returned. The petitioner went on to allege that the respondent's declared majority over himself was only apparent and colourable, inasmuch as votes were recorded in his favour of divers persons who were not entitled to vote, and the real majority of good and legal votes was in favour of the petitioner over the respondent; that some of the voters in favour of the respondent were disqualified by legal incapacity at the time their names were unlawfully placed on the register whilst others were disqualified by such incapacity subsequently incurred; that divers persons voted for the respondent who were disqualified through having been employed as agents, etc., by or on behalf of some or other of the candidates, and whose names should therefore be struck off the poll; that in other cases the votes of duly qualified electors had been personated and in others such electors had voted more than once; that certain voters were bribed, treated or subjected to undue influence by the respondent or his agents or other persons on his behalf; and that the respondent or his agents had been guilty of corrupt practices as above. Wherefore the petitioner claimed that he might be declared duly elected or, failing this, that the election should be declared void.

The respondent having intimated his intention of bringing counter charges against the petitioner, as provided for

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under sect. 43 of Act 9 of 1883, the Court, which had previously, on an application under sub-sect. 3 of sect. 8 of the said Act, fixed March 5 as the day of trial, on a further application being made for particulars to be supplied, directed the petitioner to file and serve particulars in support of his charges on or before Feb. 26 and the respondent to do the same on or before Feb. 28.

Particulars were then filed by the petitioner to the effect (1) that certain twenty persons who vote<sup>d</sup> for the respondent were disqualified as paid agents, &c., in terms of sect. 35 of Act 9 of 1883; (2) that certain other sixteen voters had been personated or otherwise had voted for the respondent after having previously duly recorded their votes; (3) that two voters were disqualified as minors and (4) another as having been convicted of fraud; (5) that two voters had been guilty of bribery within the meaning of sects. 1 and 2 of Act 21 of 1859; (6) that one person who voted was not a registered voter but voted in the name of another person whose name was identical with his; (7) that the respondent or his agents were guilty of corrupt practices by treating voters at a certain "smoking concert;" (8) that at the said concert certain nineteen voters corruptly accepted drink, cigars and entertainment given by the respondent or his agents for the purpose of corruptly influencing the election.

The particulars filed by the respondent were of a similar character, clauses 1 and 2 containing lists of persons alleged to have been paid agents or to have been personated or to have voted twice; in clause 3 one voter was objected to as both a minor and an alien and in clause 4 another was stated to have been convicted of theft; clause 5 alleged that certain voters had been bribed by the petitioner and were guilty of bribery within the meaning of sects. 1 and 2 of the Act of 1859; while the sixth and last clause alleged that a person who voted for the petitioner was not a registered voter. Altogether 61 of the respondent's votes were impeached by the petitioner and 49 of the petitioner's by the respondent.

On the case coming on for trial, however, a considerable number of these charges were abandoned and others were given up or proved to be untenable in the course of the

hearing. Thus before evidence was led it was stated that the cases of minors, aliens or convicted criminals, set forth in the 3rd and 4th paragraphs of both sets of particulars, and which were based on the provisions of sect. 10 of the Constitution Ordinance of 1853, would not be pressed, both parties apparently being willing to admit that the provisions of sect. 50 of the Ordinance, as to the register being conclusive, applied to these cases or at all events agreeing to set off their respective charges under these heads one against the other. Another class of cases of alleged personation were proved to be cases of mere clerical errors in the register—*e.g.* a voter named Edkins appeared on the register as Eakins, another named Johnson as Johnston and a third named Klinck as Vilinck—and as in these cases there appeared to be no doubt as to the identity of the voter the Court, referring to the provisions of sect. 41 of the Constitution Ordinance, expressed a decided opinion that these objections could not be maintained, and accordingly they were not further pressed. There was also a case of a voter alleged to be disqualified under § 35 of the Act of 1883, and who turned out merely to have been hired as a bandsman by the master of a band which was employed on behalf of one of the candidates and, on an expression of opinion from the Court that such employment was not within the section, this case was also withdrawn. As to the charges of bribery against the petitioner contained in clause 5 of the respondent's particulars, it turned out that this referred to the employment of certain voters as cab-drivers to bring up other voters to the poll; but the Court decided that this did not fall within the Act, either as regards the drivers of the cabs or the voters who were conveyed in them. In another case the respondent was charged with having bribed, or in the alternative with having employed as a paid agent, a voter named Kempt. The facts appeared to be that Kempt had voluntarily, and without any application being made to him, supported the respondent during the contest and made several speeches at meetings in his favour, and after the election was over the respondent, to shew his appreciation of these oratorical exertions, and as he put it by way of a *souvenir*, gave Kempt a parcel of shares of which the market

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value was said to be about £10. In this case also after the facts had been investigated the petitioner, in accordance with an intimation of the view of the Court, decided not to press the charge. Then with regard to the alleged treating at the smoking concert the entertainment was admitted and also that the respondent was present; but it appeared that the concert was given by an association called the "Citizens' Political Association," which had been formed in connection with the election and of which the main object appeared to have been to oppose the candidature of Mr. Barnato. With this end in view the association decided to support four out of the seven candidates, of whom the respondent was one, and on one occasion he and the other selected candidates addressed a meeting of electors convened by the association. The association, which had a paid secretary and incurred certain expenses, did not, however, canvass in favour of the candidates whom it supported, and there was nothing to shew that its agency had been in any way recognised by the respondent, who had his own committee and organisation. On these facts the Court expressed an opinion that the petitioner had failed to prove agency, and this view was ultimately acquiesced in and this branch of the case not pressed in argument. (Cf. *Rogers on Elections*, 15th ed. Vol. II. p. 826.) These matters having been thus eliminated very little remained with the exception of the charges of personation and the case of the paid agents. With regard to this latter branch of the case a great deal of argument took place, an objection having been raised on behalf of the respondent to the admissibility of evidence in support of the first particular, and it being contended that, even if persons were proved to have voted who, under sect. 35 of the Act, were not entitled to do so, the Court had no power to strike off their votes. In support of this contention,

*Guerin* (with him *Joubert*), for the respondent, referred to the Constitution Ordinance, sects. 8, 10 and 50, and submitted that in the case of paid agents, as well as in those of minors, aliens and criminals, the Court could not go behind or open up the register which by sect. 50 was made the conclusive test of the right to vote. The votes of these

persons could not be struck off although by voting they subjected themselves to the penalties imposed by sect. 35 of Act 9 of 1883. [LAURENCE, J.P., observed that the portion of the Act beginning with sect. 35 was headed "Punishment of Corrupt Practices," and, referring to sect. 36, inquired whether voting by a paid agent must not be regarded as a "corrupt practice," which would void the election.] Voting by paid agents was not a "corrupt practice" as defined in Act 21 of 1859 and sect. 2 of Act 9 of 1883, at all events unless it could be shewn that the payment amounted to bribery. He contended that the only cases in which votes could be deducted on a scrutiny were those enumerated in sub-sect. 6 of sect. 8 of the Act of 1883. He referred to *Stowe vs. Jolliffe*, L. R. 9 C. P. 734.

*Solomon*, for the petitioner, did not contend that voting by agents amounted in itself to a corrupt practice but argued that the votes should be struck off. He admitted that under the Constitution Ordinance the votes of minors or aliens, if on the register, could not be impeached, and that in such cases the reasoning of *Stowe vs. Jolliffe* applied, but paid agents were on a different footing and as to them sect. 50 of the Constitution Ordinance was impliedly repealed by sect. 35 of the Parliamentary Elections Act. This was a case of persons disentitled to vote, who incurred a penalty if they did so, and whose votes were therefore void: *Maxwell on Statutes*, 2nd ed. 483; *Re Cork and Youghal Ry. Co.*, L. R. 4 C. A., per Lord Hatherley, C., at p. 758; *Philpot vs. St. George's Hospital*, 6 H. L. 338. The vote of a paid agent was a mere nullity. He contended that sub-sect. 6 of sect. 8 of the Act of 1883 did not exhaust the powers of the Court and referred to sects. 47, 48 and 51 of Act 14 of 1874 and the judgment of the CHIEF JUSTICE in *O'Leary vs. Civil Commissioner of Kimberley*, 6 Juta, 297. He also referred to the English statutes on the subject of employment at elections: 7 & 8 Geo. IV. c. 37; 17 & 18 Vict. c. 102; 30 & 31 Vict. c. 102, sect. 11; 35 & 36 Vict. c. 33, sect. 25; *Boston Petition*, 31 L. T. R. 331; *Rogers on Elections*, 13th ed. 187, 189. He submitted that this Court had a general power to hold a scrutiny and was required by sub-sect. 7 of

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sect. 8 of the Act of 1883 to determine which candidate had the greater number of legal votes and was therefore bound to strike out illegal votes.

*Guerin* replied:—The provision of the Constitution Ordinance was not repealed by the Act of 1883 and the Court would not favour the theory of implied repeal: *Queen vs. Tommy, infra*, p. 382. The Act did not, like the statute of Geo. IV., declare that paid agents should be “incapable” of voting, and if it had been intended that their votes should be wholly void it would have been so provided. Sections 8 and 35 of the Act were in juxtaposition and did not refer to one another, and the powers of the Court on a scrutiny were defined by the former section read in connection with the Constitution Ordinance. He also referred to *Bradlaugh vs. Clarke*, 8 L. R. App. Cas. at p. 372, and suggested that if the votes of agents could be struck off at all it should be only in the cases where they had voted for the candidates by whom they had been employed.

The COURT, after taking time to consider, overruled the objection to the admissibility of the evidence.

Evidence was then led at length as to such of the various cases in paragraphs 1 and 2 of the particulars filed by both sides as the parties attempted to prove and the effect of this evidence, so far as material, will be found sufficiently set forth in the judgments of the Court. After further argument by counsel on the facts,

LAURENCE, J.P., said:—We have very little doubt as to what our judgment must be but as the case is important we prefer to put our reasons into writing and judgment will therefore be reserved.

*Postea* (March 11),—

LAURENCE, J.P., said:—This is a petition presented to the Court, under the Parliamentary Elections Act of 1883, against the return of the respondent as a member of the House of Assembly for the electoral division of Kimberley.



The election took place on the 13th November last when there were seven candidates for four seats, including both the respondent and the petitioner. Messrs. Barnato, Lange, Lynch and O'Leary have been declared by the returning officer and proclaimed by the Governor to have been duly elected as members, in the above-named order on the poll, and it is common cause that the result of the present inquiry can in no event affect the return of the first three members, that of the respondent O'Leary being alone impeached. According to the return, the number of votes given for the respondent was 1,034 and that for the petitioner 1,028. The petitioner claims the seat. In the petition and particulars filed by the petitioner, and in the recriminatory charges made by the respondent, there were certain allegations of corrupt practices on both sides, but these were for the most part found to be untenable and were abandoned at the trial. I need therefore say no more about them. The case at the hearing practically resolved itself into a scrutiny, certain votes given on either side being impugned on the grounds (1) that they were given by paid agents, (2) that the voters were personated, (3) that they voted more than once, (4) and in one or two cases that they were given by persons who were not registered voters. Leaving the first of these four heads for subsequent consideration, I proceed to deal briefly with the effect of the evidence as to the others. I do not think it necessary to say anything at all with regard to various cases on which evidence was led, but in which the proof failed or which were ultimately withdrawn as incapable of being maintained by the party bringing them forward. I take first the cases of personation adduced by the petitioner, and I am of opinion that it has been proved that the following ten electors were personated by certain persons for the most part unknown, who recorded votes in their names on behalf of the respondent, namely William Bell, Samuel Bodley D'Urban, Mahomet Harris, Ismail Kippi, J. P. F. Kirsten (in this case it is possible that the voter was not personated, but that he voted a second time, but this makes no difference), Charles Johnson, Edward Johnson, Laurence O'Keefe, Cornelius Rademeyer and Malari Saban. All of

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these cases are admitted by the respondent except those of Samuel D'Urban and Charles Johnson. With regard to the former, there is only one Samuel D'Urban on the register, who voted at the Magistrate's office at Kimberley, and in whose name a vote in favour of the respondent was also recorded in the Town Hall. It was suggested that the person who so voted may have been another registered voter named Benjamin D'Urban, but there was no evidence that Benjamin D'Urban did in fact vote and no explanation why if he did so he should have given his name as Samuel. This vote must therefore be struck out. In the case of Charles Johnson I am satisfied on the evidence that one Charles Johnson, who is found to have died before the election, was registered as a voter and he was the only registered voter of that name. He must therefore have been personated, and it appears from the evidence that he was personated by another man of the same name. This man is said to be now at the Gold Fields and it is possible that he may have voted in the *bonâ fide* belief that he was a registered voter. The only other case in which it is proved who was the personator is that of Laurence O'Keefe, who was personated by his brother Denis. Denis has explained that he thought he had a right to vote for his brother, whose general power he held, and this possibly may have been so, and in any case, having given his evidence, he is entitled under the Act to a certificate of indemnity. In addition to these ten persons it is proved that two men named Howard and Partapsing voted twice and that they both voted on the second occasion, and Partapsing on both occasions, in favour of the respondent. It is clear that both these votes must be struck out. In the case of Howard it was indeed suggested that having given only two votes on the first occasion he was entitled to afterwards record his remaining two votes in favour of two other candidates. But this contention was ultimately abandoned, and I feel no doubt, having regard to the provisions of sect. 46 of Act 14 of 1874 and to the English authorities cited (see *Rogers*, 13th ed. 291, and 15th ed. Vol. II. 660, *Bridgewater case*, 1 Peck 109, and *St. Andrew's case*, 4 O'M. & H. 32), that the second vote was bad and must be struck off; and

even if this were not so in the present case it would make no difference to the result, for the case of Kotze, who gave his second vote for the petitioner, is on all fours with that of Howard, and one therefore might be set off against the other. It appears therefore that on these two heads twelve votes must be struck off the respondent's total poll. On the other hand there are three cases of personation—those of Jacobs, September and Peters, which are admitted by the petitioner, and a fourth, that of Abdul Juba, which in my opinion has been established against him. There are also three cases of voting twice, namely, those of Kotze, Ramheit and Ramawaz. Lastly, there is the case of Henry Cohn, who was called for the petitioner, but who as it appeared voted for him. He is an alien and not entitled to be on the register, and it appears that in fact he is not on the register, and not to be identified with the only “Henry Cohen” who is on the register and who also voted for the petitioner. Cohn's vote must therefore also be struck off, making eight votes in all to be struck off the petitioner's total against twelve to be struck off the respondent's, and thus leaving the respondent, exclusive of the paid agents, a majority of two. Then with regard to the paid agents, I think it is proved that the following twelve persons, who are admitted to have voted for the respondent and who are also tacitly admitted not to have voted for the petitioner, were employed at the election by one or other of the candidates as paid agents within the meaning of sect. 35 of Act 9 of 1883, viz.:—M. C. Abrahams, H. Abrahams, A. Abrahams, P. Bailey, S. Bothma, W. Bolding, J. Connor, W. C. Graham, R. Hamilton, H. Lazarus, H. M. Lesar and P. Vereuil. On the other hand J. B. Perreira and T. Pybus are proved to have been paid agents and to have voted for the petitioner. If these twelve votes are to be struck off the respondent's and these two off the petitioner's total, the result follows that the respondent instead of being in a majority of two is in a minority of eight. It has been argued that the identity of the five persons in the above list, stated to have been engaged by Lowenberg on behalf of Mr. Lange, was not sufficiently established, and that this was only established in the case of the three men—H. Abrahams, Hamilton and

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Lesar—engaged by Mr. Lange personally. On the facts, and in the absence of anything to rebut the *prima facie* evidence given by Mr. Lange, I cannot agree with this argument; but even if it were so the only result would be that the respondent instead of being in a minority of eight would be in a minority of three. It is clear therefore that our decision must entirely depend on the question whether the votes of these paid agents are or are not to be struck off the roll. The question is undoubtedly a difficult one; it has been thoroughly argued and there has been an exhaustive discussion of the whole subject; but I think it necessary now to state with some fulness the reasons which have led me to the conclusion that these votes must be rejected. I must say that I have arrived at this conclusion with considerable regret, because it appears to me an undoubted hardship that the respondent's return should be prejudiced by the employment of voters as agents by other candidates, and it is a fact that of all these twelve persons only one—W. C. Graham—was employed by the respondent, eight having been employed on behalf of Mr. Lange, two for Mr. Barnato, and one for Mr. Lynch. However, we can only administer the law as we find it, and what we have to determine is the effect of sect. 35 of Act 9 of 1883, which is in the following terms: "No voter who within three months before or during any election shall have been retained, hired or employed for all or any of the purposes of the election for reward by or on behalf of any candidate at such election as agent, canvasser, clerk, messenger, or in other like employment shall be entitled to vote at such election, and if he shall so vote he shall be liable upon conviction to a penalty not exceeding fifty pounds; and upon non-payment to imprisonment for any period not exceeding six months." Now these provisions are very strong and very explicit; but on the other hand we are referred to the provisions equally strong and explicit of the Constitution Ordinance, an enactment thirty years earlier in date than the Parliamentary Elections Act of 1883. Sect. 50 of the Constitution Ordinance is as follows: "And be it enacted, that no person shall be permitted to vote in any Electoral Division for any member of the House of Assembly

except a person whose name shall be inserted in the list of registered voters for such Electoral Division, and who shall, in person, appear to vote : Provided that the list of registered voters for the time being in and for the several Electoral Divisions shall, for all purposes and in all places, be deemed and taken to be conclusive proof of the right to vote of every person inserted therein ; and no such list shall be opened up or the right of any voter mentioned therein questioned, in any manner or by any proceeding, either in the Legislative Council or in the House of Assembly.” Now, if there were any positive inconsistency or repugnancy between these two enactments, the earlier according to the general principles of construction would, *quoad* such repugnancy, be impliedly repealed by the later ; but it is contended on behalf of the respondent that there is no such inconsistency, that the right to vote of any person on the register remains, or at all events cannot be questioned, even in the case of paid agents, notwithstanding the section of the Act of 1883, and that the only effect of that section is to subject persons coming within that category, and nevertheless exercising that right, to the penalties therein provided. This is a contention which I cannot regard as valid. I think it may perhaps be held that there is no necessary inconsistency between the two enactments, and that they may be construed together, but I do not think that the consequence follows for which the respondent contends. It seems to me impossible to say of the same person at the same time that he has an unchallengeable right to vote, but that he is also not entitled to vote, that is to say has no right to vote ; that if he exercises that right it shall not be “questioned in any manner or by any proceeding” and at the same time that if he exercises it he shall be liable on conviction to a fine of £50 or six months’ imprisonment. The only reasonable construction which I think can possibly be placed on these two sections is to regard the latter as practically equivalent to a proviso to the former. The former was in effect a definition of what created the franchise to be exercised under the new constitution, and it is still in force, and the register still remains the conclusive test of the right to vote ; but the Legislature has subsequently seen fit to enact that “no voter,” that is to

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say no person coming within the definition of voters contained in the Constitution Ordinance, shall be entitled to exercise his right at any election at which he has been employed as a paid agent or in other like employment. The right to vote remains but the exercise of that right is suspended, and he is debarred from exercising it at the particular election at which he is so employed. That being so it still remains to consider whether it follows from this that it is our duty to strike off the votes of such persons. I am of opinion that it is our duty to do so and for the following reasons. In the first place considerable weight must be attached to Mr. *Solomon's* argument that an act which is prohibited by a penalty is wholly void. As *Maxwell* puts it, second edition, page 483, "when a penalty is imposed for doing or omitting an act, the act or omission is thereby prohibited and made unlawful; for a statute would not inflict a penalty on what was lawful. Consequently, when the thing in respect of which the penalty is imposed is a contract it is illegal and void." I do not see any reason in principle why the effect in the case of the exercise of the franchise should differ from the effect in the case of making a contract. In support of these observations *Maxwell* refers to the judgment of Lord Holt in *Bartlett vs. Vinor*, Carth. 252, which I find was also cited in this Court by Mr. Justice JONES, in a judgment in which I concurred, in the case of *Quinn vs. Harris*, 2 H. C., 440, where he quoted authorities to shew that a similar principle existed in the Roman and Dutch law. Then to the same effect we have the very strong observation of Lord HATHERLEY, C., in *Re Cork and Youghal Railway Company*, 4 L. R., C. A., 748, where he says, at page 758, referring to the case of *Chambers vs. Manchester and Milford Railway Company*, 5 B. & S. 588, and 33 L. J. Q. B. 268:—"I entirely adopt the view which was taken by the learned judges in that case, that everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden and absolutely void to all intents and purposes whatsoever." There is also the case apparently to the same effect of *Philpot vs. St. George's Hospital*, 6 H. L. Cas. 338, which unfortunately, as so often happens, we have not in the library and which was

cited by Mr. *Solomon* from *Fisher's Digest*, col. 8214. In the same column the case of *D'Allex vs. Jones* is referred to as an authority to the effect that "where a statute, with the view of affording protection to the public, imposes a penalty for doing an act, it thereby prohibits the act itself and renders it illegal." However, on turning to the report of that case at 26 L. J. Ex. 79, I find rather curiously that there was no direct decision on the main question and that there is an *obiter dictum* to the contrary by MARTIN, B., who is reported to have said: "The imposition of a penalty does not necessarily render the act void or illegal. *Cope vs. Rowlands* shews that the intention of the Legislature must be looked to." To which it was replied that "the distinction taken in the judgment in that case was not a sound one. *Taylor vs. Crowland Gas Co.* (23 L. J. Ex. 254)." However, it is unnecessary to pursue this branch of the subject further, and it is sufficient to express the opinion that the English authorities are on the whole in favour of the petitioner's contention that such an action as is prohibited in this section is to all intents null and void. I may add that this view also seems on the whole to be supported by the observations of *Voet*, in the passage referred to during the argument by my brother SOLOMON, where he says, Book I., III., 16, at the beginning of the section: *quod si contra leges quid actum, gestum, contractumve sit id ipso iure nullum est, adeoque nec servandum, etiamsi nullitatis comminatio nominatim legi subiuncta non sit*: and after discussing certain cases of real or apparent exception to this rule he concludes by quoting with approval the view of *Grotius* (Introduction, 1, 2, 2.) *ita demum contra leges gesta ipso iure infirma esse si id lex nominatim expresserit; vel ei qui quid gessit aut fecit gerendi facultatem et habilitatem denegaverit: vel denique id quod gestum est manifesta ac permanente turpitudine laboret*. Another reason which brings me to the same conclusion, namely, that these votes must be rejected is that such appears to have been the practice of the English Courts in dealing with similar cases and interpreting statutes of a substantially similar character. From the references given by *Rogers*, 13th ed. at pp. 187, 189, not only does this appear to have been the practice under the old Act 7 & 8

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Geo. IV., c. 37, which rendered a paid agent incapable of voting, but also under 30 & 31 Vict. c. 102, sect. 11, which is practically identical in its terms with sect. 35 of Act 9 of 1883, and the express provision for such striking off contained in the later Act, 35 & 36 Vict. c. 33, sect. 25, being merely part of the machinery for giving effect to the Ballot Act and establishing a certain presumption in order to preserve the secrecy of voting (see *Boston Petition*, 31 *Law Times* Rep. 331 and especially the judgment of BRETT, L.J., at pages 334, 335). This sect. I find on reference to the Act itself expressly includes the case of paid agents, though this does not appear from the marginal note or from the quotation given by Rogers, with reference to the Boston case, at p. 190. The only other English case to which I need refer is that of *Stowe vs. Jolliffe*, L. R. 9 C. P. 734, where it seems to me that the Court had to interpret the meaning of statutes very similar in their effect to sect. 50 of our Constitution Ordinance, qualified as for reasons already stated I regard it as being by the Act of 1883. In that case the Court after an elaborate argument and in a carefully considered judgment held that among persons who though on the register could not be allowed to vote, and whose votes if given would have to be struck off on a scrutiny, were *inter alios* those "holding certain offices or employments the subjects of statutory prohibitions," a definition which would clearly cover the class of voters now under consideration. I may conclude by briefly referring to two other reasons which lead me to the same conclusion. In the first place it was held by the CHIEF JUSTICE in the recent case in the Supreme Court of *O'Leary vs. Lord*, reported in the *Cape Times* of Dec. 15, 1888 (a),—in which case this point with regard to paid agents was expressly left open for subsequent decision—that "Under the Act of 1883, Judges who tried election petitions would have powers quite as large if not larger than the powers enjoyed by Civil Commissioners under the Act of 1874. Any power the Civil Commissioner exercised under the Act of 1874, a Judge who tried an election petition could exercise under the Act of 1883." Now turning to the provisions of the Act of 1874, I

find that Civil Commissioners were empowered on a scrutiny to strike off the votes of all persons who were not "entitled to vote" and it therefore appears that, had it not been for sect. 42 of the Act of 1883, the Civil Commissioner would have been empowered to strike off the vote of any person not "entitled to vote" under sect. 35, and hence it follows that as the Civil Commissioner would have had this power it is one which must now be exercised by the Judges. The other and last reason to which I referred is based on the terms of sub-sect. 7 of sect. 8 of the same Act, which provides that "at the conclusion of the trial of any election petition, the Court shall determine whether the respondent was duly elected, or whether any, and if so what person other than the respondent was or is entitled to be declared duly elected." I do not see how the Court can discharge this duty unless it has power to deal with votes recorded by persons not entitled to vote, for it is impossible to regard a candidate elected by the aid of such votes as being "duly elected." It was argued on behalf of the respondent that the cases enumerated in the preceding sub-sect. 6 are the only cases in which votes can be deducted on a scrutiny. There is nothing in the wording of the sub-section to support this argument and I regard it as quite untenable. The sub-section does not mention the cases of persons voting who are not on the register or of registered voters voting twice, and yet it could not be denied that in such cases the votes would have to be deducted. For the various reasons given I am of opinion that the same course must be adopted in the case of votes recorded by paid agents. The result is that 24 votes must be deducted from the respondent's total and 10 from the petitioner's, and the true state of the poll as far as these candidates are concerned is as follows: For Mr. Lord 1,018 and for Mr. O'Leary 1,010. The Court must therefore in terms of the sub-section above quoted determine that the respondent was not duly elected and that the petitioner is entitled to be declared duly elected. With regard to costs, when an election petition is in the nature of a scrutiny the usual practice is to order the unsuccessful party to pay the costs of the investigation and in the present case there appears to be nothing to justify the Court in

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departing from this rule except with regard to the charges of corrupt practices contained in paragraphs 9 and 10 of the petition and paragraphs 7 and 8 of the petitioner's original particulars. These charges have not been established and, while the general costs of the petition must be paid by the respondent, any costs which can be shewn to have been incurred by either party with reference to them must be paid by the petitioner. I may add that the Court will certify its determination to the Governor and report in writing as required by sub-sections 7 and 8 of sect. 8 of the Act. It may, however, be convenient for me to say at once that we shall report that it has not been proved that any corrupt practice was committed at the election by or with the knowledge and consent of any candidate, and also that on the evidence before the Court there was no reason to believe that corrupt practices extensively prevailed at the said election.

SOLOMON, J.:—I entirely agree with the general conclusion arrived at by the JUDGE PRESIDENT and with his reasons for that conclusion. I think it desirable, however, considering the importance of the subject, to state somewhat fully what my views are on the only question of any difficulty which has been raised in this case. That question is whether or not the Court on the trial of an election petition ought to strike out the votes of persons who fall within the terms of sect. 35 of Act 9, 1883, i.e. of "voters who within three months before or during any election shall have been retained, hired or employed for all or any of the purposes of the election for reward by or on behalf of any candidate at such election as agent, canvasser, clerk, messenger or in other like employment." The petitioner contends that the votes of such persons, whom I shall hereafter for convenience speak of as paid agents, must be deducted from the votes given for the respondent; while the respondent contends that the Court cannot interfere with these votes. Now the first argument relied upon by the respondent in support of his contention was that subsect. 6 of sect. 8 of Act 9, 1883, gives a list of the cases in which the Court is empowered to strike off votes: that the



list is a full and exhaustive one; and that, as paid agents are not included therein, the Court has no right to interfere with their votes. This argument, though at first sight a specious one, appears to me to be quite untenable. Section 3 of Act 9, 1883, provides that a petition may be presented to the Court complaining of an undue election or undue return of a member to Parliament by reason of want of qualification, disqualification, corrupt practices, irregularity or otherwise; and sub-sect. 7 of sect. 8 of the same Act provides that the Court shall determine whether the respondent was duly elected, or whether any and if so what person other than the respondent was or is entitled to be declared duly elected. Now when the Legislature gave the Court the power to inquire into irregularities at elections, and imposed upon the Court the duty of determining whether the respondent was duly elected, it surely by implication empowered the Court to do all that was necessary in order to arrive at a just decision, and therefore to deduct all such votes as by reason of irregularity, illegality or otherwise ought not to have been counted. Take for instance the very common case of a person who has voted more than once. It is clear that all votes after the first, whether on the ground of fraud or otherwise, are null and void; and yet no express power is given to the Court under sub-sect. 6 of sect. 8 to deduct such votes. But it cannot surely be held that on the trial of an election petition the Court has no power to strike off such votes. If that were so it would lead to this absurdity, that a voter might go round to all the different polling places recording his vote at each place, and yet the Court would be bound upon a scrutiny to count all such votes as good votes. The mere statement of such a case as this is sufficient to shew that the powers of the Court to deduct votes are not limited to the cases mentioned in sub-sect. 6 of sect. 8, but that the Court has a general power under the Act to strike off all bad and null votes. The second point raised by the respondent was that the intention of the Legislature in enacting sect. 35 of Act 9, 1883, was not to take away from paid agents their right to vote or to invalidate their votes, but merely to punish them if they should vote. Now the first and most important rule in the

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construction of statutes is that the Legislature must be taken to mean what it has plainly expressed. Where the words are clear and unambiguous a Court is not at liberty to speculate on the intention of the Legislature. In the present case the words appear to me to be perfectly plain and clear. The section says that no paid agent shall be entitled to vote and, if he shall vote, he shall be liable to certain penalties. If then these words are to be construed according to their plain meaning, the Legislature intended two things: first, to take away from paid agents their right to vote, and consequently to render their votes invalid, and secondly to punish them if they should vote. Why then should we be asked to say that the Legislature had in view only the second of these two objects? Of course if such an intention appeared clearly from other parts of the Act itself, we should be bound to give effect to it. But what is there to indicate any such intention? The mere addition of the penalty cannot surely neutralize the effect of the preceding words, but should rather strengthen them. In fact, according to English authorities cited at the bar on behalf of the petitioner, it would appear that the mere imposition of the penalty without anything more must be taken to prohibit the act to which the penalty is attached, and to render such act, if done, null and void. Voet, indeed, in I. 3. 16, after laying down "that whatever is done contrary to the laws is *ipso iure* null," goes on to qualify this statement by adding, "but that which is done contrary to the laws is not *ipso iure* null and void, when the law is content with a penalty laid down against those who contravene it." If then it were clear in the present case that the law were content merely with the penalty, it might on the authority of this passage be urged that the votes of paid agents are good, although they themselves are liable to a penalty for voting. But I fail to see anything in the Act which shews that this was the view of the Legislature. It is said indeed on behalf of the respondent that sect. 35 comes under the heading "Punishment of Corrupt Practices," shewing that the intention of the Legislature was merely to punish the voters and not to invalidate their votes. It is, however, now well established that the titles of Acts and the headings of sub-

divisions of the Acts are not portions of the Acts themselves, and cannot therefore be taken as guides to the intention of the Legislature. And the wisdom of such a rule is well instanced in the present Act, for sect. 35 comes under the heading of "Punishment of Corrupt Practices." If then this heading is to be taken as an indication of the intention of the Legislature, it should follow that voting by a paid agent, which is made punishable, must be taken to be a corrupt practice. And the result of this would be that under sect. 36, if the paid agent of any candidate A voted for any other candidate B, he would be guilty of a corrupt practice, and so A's election might on that ground be declared void by the Court upon an election petition, a result which surely never could have been intended by the Legislature. I cannot, therefore, agree that the fact of sect. 35 coming under the sub-division "Punishment of Corrupt Practices" shews that the Legislature was content merely with the penalty, as laid down by Voet. And indeed further on in the same section Voet quotes with approval a passage from Grotius, I. 2. 2, which is strongly in favour of the petitioner's argument, viz. that what is done contrary to the laws is of no effect, if the law has taken away the capacity or ability to act from him who has presumed to act. On the whole, therefore, I am satisfied that the Legislature intended not only to punish paid agents if they voted, but also to take away their right to vote, and consequently to render their votes invalid. But then the respondent in the third place contends that, even though by sect. 35 of Act 9, 1883, paid agents are not legally entitled to vote, nevertheless the Court under the provisions of sect. 50 of the Constitution Ordinance is debarred from going behind the register of voters, or from questioning the right of any person on that list to vote. Now in considering this point let me first state briefly what I take to be the true meaning of sect. 50 of the Constitution Ordinance. The 8th section of that Ordinance sets forth what the qualifications are which it is necessary for a person to possess in order to entitle him to be registered as a voter and to vote; while the 10th section gives a list of persons who, even though they may possess the necessary qualifications, are nevertheless disqualified

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from being registered or from voting. Then follow in the Ordinance directions with regard to the framing of a voters' list, in which, as far as possible, are to be inserted the names of all persons who are qualified under sect. 8, and not disqualified under sect. 10. Now naturally such a list could never under any circumstances be a complete or perfect one. However carefully it might be framed it is unavoidable that the names of some persons possessing the necessary qualifications would be omitted from the list of voters, while the names of others who were disqualified from voting would be inserted. But though the list would necessarily be incomplete and imperfect, it is obviously for many reasons expedient and desirable that it should for the purposes of an election be deemed to be both complete and perfect for the time being, that is to say until the next periodical registration of voters. With this object sect. 50 of the Constitution Ordinance was framed, which provides that no person shall be permitted to vote whose name does not appear on the list of voters, and that every person whose name is on the list shall have the right to vote, and that his right to be on the list shall not be questioned in any way. Or in other words, no person who possesses the necessary qualifications can vote if his name is not on the list; and every person who is on the list is entitled to vote, even though he may be disqualified from being on the list. The respondent's contention then is that notwithstanding the express provision of sect. 35 of Act 9, 1883, the Court is debarred by sect. 50 of the Ordinance from going behind the voters' list or questioning the right of any person on that list to vote. Now if we look at the *ipsissima verba* of the two sections as indicating the intention of the Legislature, it will be seen that the section of the latter Act is in part directly repugnant to that of the former. For sect. 50 of the Constitution Ordinance provides that every person who is on the voters' list shall be entitled to vote; while sect. 35 of Act 9, 1883, says that no paid agent who is on the voters' list shall be entitled to vote. That being so, it is clear that, according to the ordinary rules for the construction of statutes, the later Act must override the earlier; and therefore in the case of paid agents the Court by virtue



of the provisions of sect. 35 of Act 9, 1883, would be entitled to go behind the voters' list, and to question the right of paid agents to vote. It appears to me, however, that it is quite possible to read the two sections in such a way as to make them quite consistent the one with the other. The Constitution Ordinance deals with the framing of a voters' list, and gives directions to the Registering Officer regarding the qualifications and disqualifications of persons to be placed upon that list; while Act 9, 1883, deals with election petitions, and makes provision among other things for a scrutiny of the votes of persons who are on the voters' list. The former says that if a person's name has once been placed on the voters' list by the registering officer, his right to be on that list and therefore to vote at elections generally cannot be questioned; the latter says that under certain circumstances persons on the voters' list cannot record their votes at some particular election. The Court, then, by striking out such a vote does not necessarily open up the list or question the right of such person to be on the voters' list or to vote at elections; but it merely decides that the vote given at a particular election is null and void, and cannot be counted. The case appears to me to be somewhat analogous to that of a person who has been guilty of a corrupt practice, such as bribery for instance. In such a case the Court does not open up the list, or question the right of a registered person who has been bribed to vote generally, but it decides that on this particular occasion the vote is a corrupt one, and cannot therefore be counted. And it is important to remark here that in such a case it has been decided in the English Courts that the vote is void at common law, and ought to be struck out on a scrutiny, even though there is no express provision to that effect in the Act. Taking this view then of the two sections, which seems to me to be a perfectly reasonable one, it will be seen that there is not necessarily any repugnancy between them. But in any case, whether the sections are repugnant or not, the result is the same, that the Court is bound to give effect to the provisions of sect. 35 of Act 9, 1883, and upon a scrutiny to strike out the votes of all paid agents. The conclusion to which I have come upon the construction of

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the statutes is fortified by the law and practice in England, where such votes have on many occasions been held to be invalid. This part of the case, however, has been so fully dealt with by the JUDGE PRESIDENT that I do not propose to add anything to what he has said. I would only add in conclusion that I think that it would have been a far more equitable rule, if the Legislature had provided that the votes of paid agents should be struck out in case they voted for the persons by whom they had been employed, instead of entirely depriving them of the right to vote at the election. Our duty, however, is merely to construe the words of the Legislature without regard to the hardship of their application on any particular occasion. And however hard the present case may be to the respondent I can come to no other conclusion than that he was not duly elected, and that the petitioner is entitled to be declared by the Court to have been duly elected.

COLE, J.:—The only difficulty that presented itself to my mind during the hearing of this case was that sub-sect. 6 of sect. 8 of the Act, while it enumerates votes that may be struck out, is silent in regard to those of paid agents. But that sub-section by no means says that the votes therein enumerated are the only ones which can be expunged. The voting by paid agents is made illegal and a penalty is attached to it. If then in face of this we were to say, "although these votes were improperly given, we shall allow the principals nevertheless to get the benefit of the illegal acts of their agents," we should place ourselves in a most anomalous position. It is true that these votes were not in all cases given by the agents in favour of those who paid them, and I certainly think that the law might very well be amended to meet such instances. But at present it makes no distinction and while the law remains as it is I conceive myself bound to carry it out, and therefore to strike out every vote proved to have been given, no matter in whose favour, by a paid agent.

[ Petitioner's Attorneys, CALDECOTT & BELL.  
Respondent's Attorneys, COGHILAN & COGHILAN. ]

NIEBUHR AND ANOTHER *vs.* JOEL.

*Principal and agent.—Broker.—Payment by broker to vendor.  
—Custom of Share-market.*

*N., a broker, sold certain shares at Kimberley for J. to W., who lived in Natal, and handed J. a broker's note, according to the terms of which payment was to be by "sight draft, scrip attached." A similar note was forwarded to W. On the same day N., as was customary in such transactions, paid J. the purchase price less brokerage and received from him the shares. N. then drew on W. for the amount but the bill was dishonoured on presentation. N. thereupon requested J. to refund the amount paid and take back the shares and on his refusal resold them at a loss. By the custom of the share-market and in the view taken by the parties to this transaction W., though residing in another Colony, was not regarded as a foreign principal. On a special case stating these facts, the Court held that N. was not entitled to recover from J. the amount lost on the resale of the shares.*

This was a special case stated for the opinion of the Court in the following terms:—

1. The plaintiffs carry on business together in Kimberley in copartnership, as brokers, under the style or firm of Niebuhr and Harris.

2. The defendant is a diamond and share dealer, trading in Kimberley.

3. On or about the 6th day of December last the plaintiffs, as brokers, sold, for and on account of the defendant, to E. H. Wardle and Company of Pietermaritzburg, 200 shares in the Johannesburg Pioneer Gold Mining Company at £7 15s. 0d. per share, as will be seen on reference to the broker's note hereto annexed and which contains the contract between the defendant and the said E. H. Wardle and Company; and such broker's note was duly handed by the plaintiffs to the defendant, and a duplicate thereof was duly forwarded to the said E. H. Wardle and Company.

4. It will be seen on reference to the said contract, that it was stipulated that the seller should pay brokerage and the payment for the said shares was to be "sight draft with scrip attached."

5. On the said 6th day of December the plaintiffs paid the defendant the amount of the purchase price of the shares, less the brokerage, to wit, the sum of £1,534 10s., and received the said shares from the defendant as is usual and customary in such transactions in the share market of Kimberley.

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6. The plaintiffs thereafter on or about the 6th day of December last drew a bill of exchange at sight, upon the said E. H. Wardle and Company, for the sum of £1,550, attaching the scrip for the said 200 shares to the said draft.

7. The said bill was duly presented to the said E. H. Wardle and Company, for acceptance and payment, and was dishonoured.

8. The plaintiffs thereupon gave notice to the defendant of the dishonour of the said bill, and requested the defendant to refund to them the amount of £1,534 10s., offering to return to defendant the scrip for the said 200 shares.

9. The defendant refused to refund the said sum of £1,534 10s. to the plaintiffs, and to accept the scrip for the said 200 shares.

10. The plaintiffs thereupon, to wit, on or about the 14th day of December, 1888, sold the said 200 shares for the sum of £1,100.

11. By the custom of the share market in Kimberley principals in transactions of the nature of the aforesaid resident in the Colony of Natal are not regarded as foreign principals, but are regarded as being on the same footing as principals resident within the jurisdiction of the Courts of this Colony.

12. In the present transaction the said E. H. Wardle and Company were not regarded by either the plaintiffs or the defendant as foreign principals.

13. The plaintiffs contend that the payment by them to the defendant was merely by way of advance and that they are entitled to claim from the defendant the loss sustained in the transaction, and they claim :

(a) The sum of £434 10s.

(b) Interest upon the said sum of £1,534 10s. from the 6th day of December, 1888, to the 14th day of December, 1888, and on £434 10s. from the 14th day of December, 1888.

(c) Costs of suit.

14. The defendant contends that upon payment to him of the amount of the purchase price by the plaintiffs, the transaction was closed, and that he had no further interest in the said shares, nor in the subsequent events hereinbefore set forth.

15. Should the Court decide in favour of the plaintiffs, judgment will be entered for the plaintiffs in terms of their claim. Should the Court uphold the defendant's contention, judgment will be entered in favour of the defendant with costs.

*Solomon* (with him *Joubert*), for the plaintiffs, said that on the face of the note the contract was between the defendant and Wardle, and any point which might have arisen as to a foreign principal was expressly waived. He referred to *Fowler vs. Hollins*, L. R. 7. Q. B. 616. [LAURENCE, J.P., referred to the evidence as to custom and as to the personal liability of brokers in the recent case of *Bernstein vs. Tayler*, *supra*, p. 258.] Here the nature of the original contract

was clear and the only question was as to the effect of the subsequent payment. There was nothing to shew that the plaintiffs were the agents of the purchaser for the purpose of making payment or any other purpose than that of making the contract: *Tank vs. Jacobs*, 1 Jut. 289. [LAURENCE, J.P., referred to *Stibbs vs. Le Roux*, 3 H. C. 356.] If the plaintiffs had diverted the shares, the purchaser could have sued the defendant on the contract, he having no authority to deliver to the plaintiffs. Moreover, if the purchaser had become insolvent the trustee could not have claimed the scrip as the property had not passed to him. [LAURENCE, J. P.:—That seems to be the real question, whether when the plaintiffs received the scrip and paid the money they must not be presumed to have done so in their capacity as agents for the purchaser. SOLOMON, J.:—Was not Joel justified in regarding the brokers as having authority from Wardle to do what they did?] If it is suggested that the plaintiffs were substituted for Wardle as parties to the contract, the answer is that there can be no such novation without consent. The scrip would not become Wardle's property till paid for by him, and if the defendant had merely delivered the scrip he could not have maintained an action for the purchase money against the plaintiffs. [LAURENCE, J. P.:—But now his position is stronger, for this is really a *condictio indebiti soluti*, and the defence is that there was a *debitum*, which the plaintiffs, possibly in order to realise their commission, took it upon themselves to discharge.] It is submitted that on the facts this must be regarded as an advance to the defendant by his own agents: *Gingell vs. Glascock*, 8 Bing. 86. [LAURENCE, J.P.—There the plaintiff was the agent for the defendant alone, and not for both parties, and the goods sold were never delivered either to the purchaser or to any one on his behalf.]

*Hopley, C. P.* (with him *Feltham*), appeared for the defendant.

LAURENCE, J.P.: At present we do not think that we need trouble the *Crown Prosecutor*, but if on further consideration it appears necessary to hear him an intimation

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will be given. Otherwise judgment will be delivered at the next sitting of the Court.

*Postea* (March 14),—

The judgment of the Court was delivered by

SOLOMON, J., as follows :—This is a special case agreed on between the parties for the opinion of the Court. The argument on behalf of the plaintiffs was heard on Monday, and at its conclusion the Court intimated that they did not then desire to hear any argument on behalf of the defendant, but that, should it become necessary to do so, a notice to that effect would be sent to the Crown Prosecutor. We are, however, still of the same opinion as we were at the conclusion of the plaintiff's argument, that our judgment must be for the defendant, and do not therefore require that the case should be further argued. It appears that the plaintiffs as brokers sold on the 6th December for the defendant to Wardle & Co., of Pietermaritzburg, 200 shares in the Johannesburg Pioneer G. M. Co., at £7 15s. per share. A broker's note, which is attached to the special case, was drawn up by the plaintiffs, setting forth the names of the seller and buyers and the price of the shares, containing in addition the following words: "Payment Sight Draft, Scrip attached." On the same day the plaintiffs paid the defendant the amount of the purchase price less brokerage, and received the shares from the defendant, "as is usual and customary in such transactions in the share market of Kimberley." Thereafter the plaintiffs on the same day drew a bill of exchange at sight upon Wardle & Co. for the price of the shares, attaching the scrip to the draft. Upon presentation of the draft to Wardle & Co., however, it was dishonoured; and the plaintiffs thereupon gave notice to the defendant of the dishonour, and requested a refund of the money which they had paid him offering at the same time to return him the scrip. The defendant, however, refused to refund the money, and the plaintiffs consequently sold the shares for the sum of £1,100. The special case states that in such transactions as these principals resident in the Colony of Natal are not regarded as foreign princi-



pals, and that they were not regarded as such in the present transaction by either the plaintiffs or the defendant. The question submitted for the opinion of the Court is whether the loss of £434 10s. incurred by the resale of the shares is to be borne by the plaintiffs or by the defendant. The argument for the plaintiffs was shortly to this effect: That the plaintiffs received the shares from the defendant as his agent for the purpose of transmitting them to Wardle & Co., and receiving the purchase price from them; that the price of the shares was paid by the plaintiffs to defendant merely by way of advance, and that as the sale fell through they were entitled to a refund of the money upon offering to return the shares to the defendant. Now it will be seen that this argument is based upon certain facts which are not stated in the special case, but which are inferences drawn from certain other facts which are stated in the case. If these inferences are correctly drawn, the plaintiffs' conclusion of law is irresistible; so that really the only question which we have to consider is whether these inferences are such as the Court can fairly and reasonably draw from the facts agreed upon between the parties. We cannot help thinking that it would have been far more satisfactory to ourselves as well as to the parties concerned if the case, instead of being stated as a special case, had taken the form of an ordinary trial cause. If that had been done, we would have been in a far better position for coming to a definite conclusion upon all the facts necessary to enable us to arrive at a decision. However as the parties have elected to leave the matter to the Court in the form agreed upon between them, we do not feel justified in refusing to decide the question which has been submitted to us. We are then clearly of opinion that the facts stated do not warrant us in coming to the conclusion that the plaintiffs in paying the purchase price to the defendant on receiving the shares from him acted as his agents, but rather that they acted as agents for Wardle & Co. If after the contract had been concluded the defendant had merely handed over the shares to the plaintiffs without anything further, then it might fairly have been urged that they were employed by the defendant as his agents to transmit the scrip to Wardle & Co., and to

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receive the money from them. But when we have the additional fact of the money being paid to the defendant by the plaintiffs it is quite impossible in the absence of any direct evidence to that effect to come to such a conclusion. The suggestion that the payment of the money by the plaintiffs to the defendant was by way of advance appears to us to be an altogether unreasonable and improbable one. We do not say that it is impossible that an agent should under certain circumstances make such an advance to his principal, but we do think that it is most unreasonable to expect us to come to such a conclusion in the present case upon the facts which are laid before us. More particularly is that so when there is another perfectly plain and reasonable inference to be drawn, viz. that the plaintiffs in acting as they did were acting as the agents of Wardle & Co. It is said the plaintiffs could not have been acting as the agents of Wardle & Co., because the duty of the brokers was merely to negotiate the purchase and sale, and as soon as that was concluded they were *functi officio*, and had no authority from Wardle & Co. to pay the money or receive the shares. Now it appears to us that there are two conclusive answers to this contention. For in the first place it is stated in the special case that it is the custom in the share market of Kimberley for brokers after the sale is concluded to pay the price and to receive the shares. Wardle & Co. as they were dealing in the Kimberley market must be taken to have dealt according to the custom of that market, and to have intended that their order should be carried out according to the general usages of that market. Consequently in the absence of any express instructions to the contrary they must be taken to have authorised the plaintiffs to pay the money and to receive the shares. But in the second place, even assuming that the plaintiffs had no such authority from Wardle & Co., they certainly by their conduct induced the defendant to believe that they had; on the faith of that representation the defendant parted with his shares; and it does not now lie in their mouth to say that in reality they were not acting as the agents of Wardle & Co. Or, looking at the matter from another point of view, the action, as was pointed out by the JUDGE PRESIDENT in the course of the

argument, is in the nature of a *condictio indebiti soluti*, while it is impossible to say that the money, when paid to the defendant, was not due to him, and consequently the action must fail. I have assumed thus far, though it is not so expressly stated in the special case, that the plaintiffs were authorised by Wardle & Co. to purchase the shares on their behalf. It may be, however, that they had no such authority, and that the reason why Wardle & Co. dishonoured the draft was because they repudiated the plaintiffs' authority to purchase the shares for them. If that be so, the plaintiffs of course are in no better position, for in that case they would really have been the principals in the transaction instead of being merely the brokers, and so they would have been personally liable upon the contract. Our judgment therefore must be for the defendant with costs.

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[Plaintiffs' Attorneys, KNIGHTS & HEARLE.  
Defendant's Attorneys, H. C. & J. C. HAARHOFF.]

### JUDGE, N.O., vs. KIMBERLEY DIVISIONAL COUNCIL.

*Derelict lands.—Divisional Council.—Acts 4 of 1865, 3 of 1879, 28 of 1881 and 24 of 1887.*

*On certain derelict land, held on quitrent tenure from the Crown, land rent was overdue to the Government and rates to the divisional council for a period exceeding five years. The Government gave notice under Act 3 of 1879 of their intention to resume possession. Before the statutory interval had expired, the divisional council, on an ex parte application, obtained an order in chambers, under Act 28 of 1881, for the attachment and sale of the land in question to satisfy their claim for rates. An application made on behalf of the Government to set aside this order was refused.*

*In proceedings instituted by a divisional council, a warrant to sue signed by the Civil Commissioner, as chairman, is necessary only where such warrant is required under the rules of Court.*

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This was an application to set aside an order of Court, granted by Mr. Justice COLE in Chambers on March 21, whereby leave had been granted to the divisional council of Kimberley to attach and sell a certain farm called Langeleg, of which the registered owner was one Marais, in satisfaction of the council's claim for arrear rates due on the said farm. The applicant, who was the Civil Commissioner of Kimberley, alleged that the true and full facts of the case were not brought to the knowledge of the learned Judge at the time the order was made. It appeared that the original order was granted, under the provisions of sects. 4 and 10 of the Derelict Lands Act, 28 of 1881, as amended by Act 24 of 1887, on the petition of the secretary of the Divisional Council, which set forth that the sum of £23 15s. was due to the Council for arrear rates on the said farm from 1882 to 1888 both inclusive, and that the farm had been abandoned or left derelict and the owner thereof could not be found. The order having been granted, under sect. 10 of the Act, the deputy sheriff proceeded to attach the property by giving notice, as provided by sect. 16, to the registrar of deeds, who was also Civil Commissioner, and in that capacity *ex officio* chairman of the Divisional Council, and who now petitioned for a cancellation of the above order. The petition stated that the Divisional Council, at a meeting at which the chairman was not present, had authorised the secretary to take the necessary steps for the recovery of the rates in question, whereupon he had applied in chambers and obtained a final order for attachment and sale as above set forth. There was due and owing to the Colonial Government in respect of the said farm the sum of £17 12s. for quit rent from 1872, and due notice had been given in terms of Act 3 of 1879, as amended by Act 24 of 1887, that the said Government intended dealing with the said farm as derelict, which notice had been duly published in terms of the said Act of 1879 on three occasions both in the *Gazette* and in a local newspaper, the latest publication having been on March 15, 1889. The petitioner alleged that, as he believed, the secretary of the Divisional Council was aware that these notices had duly appeared and that the said secretary did not obtain the consent or approval of



the petitioner in his capacity as chairman of the Council before making the application in Chambers, nor did the petitioner have any knowledge or notice that such application was to be made, nor did he sign any warrant for such proceedings as required by sect. 72 of Act 4 of 1865. The Divisional Council had obtained a writ of execution for the attachment and sale of the farm in terms of the order of Court, and if the said order were carried out the Government would be greatly prejudiced in their rights with regard to the said derelict farm. In reply to this petition Mr. Bradford, the secretary of the Divisional Council, made an affidavit to the effect that he had been duly authorised by the Council to take the proceedings in question under the Act of 1881 and that the petition had been presented by himself as secretary, as the facts with regard to the arrear rates were peculiarly within his knowledge as collector. He submitted that the Government would not be prejudiced by the carrying out of the order, inasmuch as the farm was valued by the Council at £950, and the proceeds of the sale would therefore be more than sufficient to cover the preferent claim of the Government for arrear quitrent as well as the claim of the Council for rates. On searching the records of the Deeds Office he had ascertained that there were no mortgages or hypothecations registered against the said farm. In reply to this the applicant made a further affidavit, pointing out that, in terms of Act 3 of 1879, unless the farm was claimed by the rightful owner and the quitrent due thereon paid, it would become the property of the Colonial Government. He also produced a power of attorney to transfer the farm, signed by Marais, from which it appeared that in 1871 he had sold the farm to Messrs. Jefferson and Brown for £600, in consequence of which transfer duty had accrued to the Government in addition to the other charges on the property, and there were due to the Government in respect to the property charges for transfer duty, fines, survey expenses, stamps and quitrent, amounting in all to £205, while the only claim which could be proved by the Government against the proceeds of sale by the sheriff, as provided by sect. 18 of the Act of 1881, was that for quitrent. In reply to these allegations an

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affidavit was filed by the respondents' attorney, stating that it appeared from the records of the Griqualand West Land Court, held in 1876, that the farm Langeleg had been by the judgment of that Court awarded to Marais and not to the claimants, Messrs. Jefferson and Brown.

*Hopley, C.P.*, for the applicant, in the first place contended that the proceedings in Chambers were void *ab initio*. Act 4 of 1865, sect. 72, provided that "in all suits and proceedings" by any divisional council "in any court other than the Court of the Resident Magistrate, the warrant to sue or defend shall be signed by the Civil Commissioner thus: 'By order of the Divisional Council, C. D., Civil Commissioner.'" This had not been done in the present case, and he contended that the intention of the Legislature was that no proceedings should be instituted by divisional councils without the written authority of the civil commissioner.

*Solomon*, for the respondent council, submitted that the signature of the Civil Commissioner was only necessary in cases where, under the 8th Rule of Court, a warrant to sue had to be filed with the Registrar. This would include not only "suits" but other "proceedings," as for civil imprisonment and sequestration, but did not apply to petitions such as the present.

The COURT, having ascertained from the Registrar that it was not the practice to require powers to be filed in cases like the present, overruled the preliminary objection.

*Hopley, C.P.*, said the main question was whether, after the Government had set on foot proceedings under the Act of 1879, a body like the Divisional Council could step in, under the Act of 1881, and by an order obtained on an *ex parte* application render nugatory the action taken by the Government. He contended that under the Act of 1879 the rights of the Government began to run as soon as the first advertisement was published, and their title to the property became complete unless, in the interval provided by the Act, the grantee of the property or his representative

stepped in. He admitted that the Government on resuming would not be liable to the Council for arrear rates, but submitted that they had a vested right as soon as proceedings under the Act were commenced and that this could not be defeated by the subsequent claim of any third party.

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*Solomon, contra*:—The Government at present has only a right to the arrear quitrent, which is fully secured by sect. 18 of the Act of 1881, and the claim for transfer duty on the facts as set forth is quite untenable. The Act of 1881 is the later enactment and, while protecting the rights of the Government, gives a remedy to public bodies for the recovery of overdue rates on abandoned property: *Maxwell on Statutes*, 195. The two Acts were so to speak parallel, and did not conflict with one another, but if the Government were allowed to resume the property they would take it without encumbrances, except mortgages, and the Council in that case would be remediless.

*Hopley, C.P.*, in reply:—If it was intended that the Act of 1881 should in any way abrogate that of 1879 it should have been explicitly stated. Derelict land was presumably valueless and the Legislature apparently intended that in such cases the Government should be allowed to resume free of the burden of arrear rates, &c.

LAURENCE, J.P.:—This is an application to set aside an order, granted by Mr. Justice COLE in chambers on the 21st of last month, for the attachment and sale of a certain farm called Langeleg in satisfaction of the claim of the Kimberley Divisional Council for arrear rates due on the said farm for the last seven years. The application was made and the order granted under the provisions of sects. 4 and 10 of the Derelict Lands Act of 1881. Sect 4 of this Act, as amended by Act 24 of 1887, is as follows:—

“Whenever there shall remain due and unpaid for the space of five years, any quitrent or reservation in the nature of quitrent payable to any person or body corporate or incorporate (other than the Colonial Government), or any rate or assessment payable to any municipality, municipal corporation, divisional council or other public body, upon

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any immovable property in this Colony, and such property shall be abandoned, deserted and left derelict, and the owner thereof cannot be found, it shall be lawful for the person or body claiming such quitrent, rate or assessment to apply to the Supreme Court by petition stating the amount claimed to be due and the grounds for applying for relief under the provisions of this Act."

Then section 10 provides that :—

"Upon considering any petition for the sale of immovable property abandoned and left derelict, to satisfy any such claim as is referred to in the fourth section of this Act, the judge before whom such petition is laid or the Court, should such judge by order or rule granted refer such petition to the Court, may order that the property mentioned in the petition be attached and sold to satisfy such claims as aforesaid thereon."

Now in proceedings under these sections and the other sections of the same Act, which deal with petitions for the registration of title to derelict lands, although it is clearly competent for the Judge in Chambers, to whom the petition is submitted, to make, if he thinks fit, a final order, I have always thought it the safer course either to refer the matter to the Court, as provided by the sixth section of the Act or, in ordinary cases, to grant a rule *nisi* as provided by the seventh section. This I believe has been the usual practice in dealing with applications under this Act, and no doubt it will be regularly followed in future. In the present case, however, a final order having been granted we are asked to set it aside on the ground that the true and full facts of the case were not brought to the knowledge of the Judge in Chambers, and I think this application must therefore be dealt with on the same footing as if a rule *nisi* had been granted in the first instance and the applicant were now here to shew cause against its being made absolute. That being so, the question is whether sufficient cause on the facts now before us has been shewn for discharging the original order. Now in the first place I do not see that any fault can be found with the secretary of the Divisional Council for presenting this petition under the Act of 1881. He was in fact expressly authorised by the Council to take

the necessary steps for the recovery of these rates ; it is not suggested that there were any other steps open to him to take ; it was not his fault that the *ex officio* chairman of the Council happened to be absent from the meeting at which the resolution under which he acted was passed ; and what he did is now supported by counsel instructed on behalf of the Council to defend the validity of the order made. The facts of this case, in which the Civil Commissioner as representing the Government is necessarily placed in conflict with the Council of which he is chairman, might indeed suggest the question whether it would not be more convenient, both for the Civil Commissioner and for the Council, for public bodies of this kind, like municipal councils, to have their own independent and elective chairman and so obviate the risk of difficulties of this kind arising ; but this is a matter upon which it would be travelling beyond our functions to express any definite opinion, and it is sufficient to point out that the present system is undoubtedly calculated in cases like the present to produce a certain amount of embarrassment and inconvenience. However the main point upon which the applicant, as representing the Government, relies is that the Divisional Council was debarred from taking these proceedings and disentitled to the order which has been obtained owing to the Government having, so to speak, forestalled it by initiating proceedings and putting in operation the machinery created by sect. 1 of Act 3 of 1879. This section, as amended by Act 24 of 1887, is in the following terms :—

“Whenever any land rent due to the Colonial Government in respect of any place or property held from the Crown shall remain unpaid for the space of five years, and such place or property shall be abandoned, deserted and left derelict, and neither the grantee or lessee, as the case may be, of such place or property nor his lawful representatives in regard to the same can be found, it shall be lawful for the Governor to advertise such place or property as derelict in the *Government Gazette* and any other newspaper he may think fit, not less than once in each of three consecutive calendar months, and if within three months from the date

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of such last-mentioned advertisement neither the grantee or lessee, as the case may be, of such place or property, nor his lawful representatives shall establish his or their claim to the same, and pay the land rent so overdue, the Governor shall at the expiration of such last-mentioned period of three months resume possession of the said place or property, and deal with the same under the provisions of any law in that behalf for the time being in force in this Colony: Provided always, that if the place or property, with regard to which the proceedings in this Act mentioned shall be taken, shall be under mortgage, the provisions of the eighth, ninth, and tenth sections of Ordinance 9 of 1844, with reference to the sale of such place or property, and the application of the funds thereof, shall apply to the same."

Now it is quite clear, if this Act stood alone, that, as contended by the applicant, as soon as the machinery provided by this section has been set in motion, as has been done in the present instance, the Government acquires a title to the property in question defeasible only in the event of the grantee or lessee of the land, or his lawful representative, putting in an appearance, establishing his claim and paying the overdue quit-rent within the allotted period of three months, a period which in the present case is still unexpired. But the question with which we have to deal is how far if at all the provisions of this Act are affected by the later enactment of 1881. As a general rule, when two Acts relate to the same subject, the former must be regarded as controlled by the latter; and sect. 1 of the Act of 1881 contains the usual provision repealing so much of any previous law as may be repugnant to or inconsistent with its provisions. Now while the object of the Act of 1879 was to give the Government a simple and efficient remedy in cases in which land-rent was overdue for a certain period, the object of section 4 of the Act of 1881 was to afford a similar remedy for the recovery of quitrents, rates or assessments overdue for a similar period to persons or public bodies other than the Colonial Government. Is there then anything in the Act of 1881 to debar the parties interested from availing themselves of its provisions in cases where the Government has already initiated proceedings under the



Act of 1879? There is no express provision to that effect, and on the whole it appears to me that no such provision can be fairly held to be implied. I think that a contrary decision would involve reading into the statute provisions which it does not contain, and would inflict considerable hardship in cases such as the present. For while the claim of the Government for land rent, which it was the object of the Act of 1879 to secure, is duly safeguarded by sect. 18 of the Act of 1881, which in the case of an attachment under the Act expressly provides for the proof of such claim, on the other hand, if the property is resumed by the Government, it is admitted that such resumption would be free from any liability for arrear rates. If therefore we were to uphold the contention of the applicant, it would always be open to the Government, by proceeding under the Act of 1879 as soon as five years' rent was overdue, to entirely defeat the claims for rates, etc., which it was intended by the Act of 1881 to protect, save in the cases, which would probably be rather the exception than the rule, where five years' rates had previously accrued due to some public body, such as a municipality or divisional council. There is nothing to shew that such a result can have been contemplated by the Legislature, and I am therefore of opinion that there was nothing to debar the divisional council from taking these proceedings and that no sufficient cause has been shewn for setting aside the order which has been made. As to the other claims of the Government for transfer duty, etc., set up in the replying affidavit of the Civil Commissioner, and alleged to be due since 1871, it is sufficient to observe that, on the facts now before us, these claims do not appear to be established; but if they should eventually be capable of proof, section 20 of the Act of 1881 appears to provide a method by which they could be satisfied previous to the payment of the balance of the proceeds of the sale into the Guardians' fund or otherwise as may be ordered. On these grounds I am of opinion that the present application must be refused with costs. Should the Government desire to appeal from this decision they will however have an opportunity of doing so before the sale takes place.

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SOLOMON, J.:—I entirely agree with the judgment which has been delivered by the JUDGE PRESIDENT. The application is for an order to set aside an order made by Mr. Justice COLE in Chambers, on the ground that such order was made by mistake, inasmuch as the applicants in that matter wilfully withheld from his notice certain material facts, the knowledge of which would have precluded him from making the order now objected to. Now if the applicant can establish this position, I think he would be entitled to the order prayed for; but if the order of the Judge in Chambers would have been the same even if these material facts had been brought to his notice, then it is clear that the application cannot be granted. Now in my opinion if all the facts which are now before the Court had been before the Judge in Chambers, he would have been fully justified in making the order complained of. The main contention on behalf of the applicant is that, when once the Governor has commenced to take proceedings under Act 3, 1879, for the resumption of derelict land, such proceedings cannot be stayed except in the manner indicated in that Act; that is to say, except the grantee or lessee of the property or his lawful representative shall establish his claim to the same, and pay the land rent overdue. Now, if the provisions of Act 28, 1881, under which the divisional council has proceeded, had become law prior to the passing of Act 3, 1879, there would undoubtedly have been much force in the argument. For it is clear that the Legislature in framing Act 3, 1879, intended to safeguard the rights of all persons having any interest in derelict lands, such as lessees, mortgagees, etc. And if the divisional councils at that time had possessed the rights which are conferred upon them by Act 28, 1881, in respect of derelict lands, and if these rights had not been protected by Act 3, 1879, it might have been urged that the Legislature intended that such rights should be subject to the rights conferred upon the Government by that Act. But when we bear in mind that these rights were conferred upon divisional councils after the passing of Act 3, 1879, the case is different. When Act 3, 1879, became law, the only rights which divisional councils possessed in respect of arrear rates were by taking pro-

ceedings against the owner of the property, which rights of course are not affected by that Act. But then came Act 28, 1881, which empowered divisional councils to obtain an order for the sale and attachment of derelict land in order to satisfy the arrear rates due upon such land. When that Act was passed the Legislature clearly had in mind the previous provisions of Act 3, 1879, which empowered the Governor to resume possession of such land, or rather which facilitated the manner of proceeding for the purpose of such resumption; and notwithstanding this they empower the divisional councils to take proceedings against such lands, without in any way protecting the rights of the Governor, or providing that the rights of divisional councils should be subject to the rights of the Governor under that Act. That being so, it appears to me that so far from Act 3, 1879, overriding the direct provisions of Act 28, 1881, we must infer that the Legislature intended that, if there were any conflict between the two Acts, the earlier Act should be controlled by the later one. The provisions of Act 28, 1881, are very wide, and I do not see what there is to justify us in deciding that the Judge in Chambers was precluded from making an order for the sale and attachment of the land in question merely because the Governor had already commenced to take proceedings under Act 3, 1879. If that were our decision, it appears to me that it would be most inequitable, for it would enable the Government, if they were prompt, in most cases to defeat the rights of divisional councils and other public bodies, and so to render nugatory the provisions of Act 28, 1881. For the proceedings under that Act cannot be commenced until the rates have been in arrear for a period of five years; and if the land has been derelict for that period we may reasonably presume that quitrent also would be in arrear for the same time, and consequently that the Governor would be in a position to take proceedings under Act 3, 1879, for the resumption of the land. The moment these proceedings were initiated, then, according to the argument of the applicant, the divisional council is debarred from exercising the rights conferred upon it by Act 28, 1881; so that if the Government are prompt in initiating the proceedings, the

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objects of Act 28, 1881, would in a large number of cases be defeated. For not only would the divisional council be precluded from taking proceedings under Act 28, 1881, but they would lose their arrear rates altogether, for the owner of the land cannot be found, and when the Governor has resumed possession of the land he clearly could not be held liable for the rates. I can scarcely think that this was the intention of the Legislature. I prefer to believe that the Legislature intended to protect the rights of all parties, and I think it is our duty, if possible, so to interpret the statutes as to obtain that result. This it appears to me is done by the conclusion at which we have arrived. For not only is the council thus enabled to obtain its arrear rates, but the rights of the Government in respect of quitrent are also protected by sect. 18 of Act 28, 1881. The Government thus obtain their dues, and in addition there is the prospect of their ultimately obtaining, under sect. 20 of the Act, any balance remaining due to them after the first charges upon the property have been paid. I therefore concur in thinking that the application must be refused.

COLE, J.:—When this petition in the first instance was submitted to me in Chambers, nothing was said about the land in question being held from the Crown on quitrent and the only information before me was that it was derelict property of which the owner could not be found. Had I known that this was Crown land I should certainly have only granted a rule *nisi* and, as the case now presents itself, I regret that I did not adopt that course. At the same time, even if this fact had been duly alleged, I should certainly have presumed, and I think I should have been entitled to presume, that a petition by the divisional council, presided over *ex officio* by the Civil Commissioner, would not have been presented without the cognizance of that official and unless he was satisfied that the Government had no prior claims to the property in question. As it is, for the reasons already stated, in which I concur, the Government will lose nothing by my order. With regard to the claim for transfer dues, it simply comes to this, that the Government has a suspicion that the property was sold



nearly twenty years ago. If that was the case it ought to have been ascertained long since and in the circumstances, if the Government should lose their dues in this respect, I cannot say that I should feel much sympathy for a loss entailed by their own neglect.

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[Applicant's Attorneys, GRAHAM, VIGNE & MALLETT.  
Respondents' Attorneys, H. C. & J. C. HAARHOFF.]

### GILCHRIST AND CO. vs. STONE.

*Contract of sale.—Custom of share market.—  
Measure of damages.*

*By the custom of the Kimberley Share Market, where shares are sold by a broker to be paid for on arrival at a future date, the contract is not regarded as completed until the name of the vendor has been disclosed and approved by the purchaser.*

*S. agreed to purchase certain shares from G., to arrive within ten days, but repudiated the contract on the same day. The shares arrived after seven days and were then tendered and refused. Held, that the measure of damages was the difference between the contract price and the market price on the day of tender.*

The plaintiffs in this action, share dealers at Johannesburg in the South African Republic, alleged that on Feb. 9 they sold the defendant, a share dealer at Kimberley, 300 shares in the Steyn Gold Mining Company at 42s. per share, that in terms of the contract of sale the said shares were tendered to him on Feb. 16, but he refused to accept them, and that the plaintiffs thereafter on Feb. 20 sold them in the open market at 30s. They claimed £180 damages. The defendant pleaded that he purchased the shares in question through a broker on condition that he approved of the names of the principals when disclosed and that on disclosure by the broker of the plaintiffs as principals, at a later period of the same day, he refused

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to close the bargain which was consequently never completed. He further pleaded that, by the custom of the share-market at Kimberley, transactions in which credit was given or shares were to be delivered at a future date were not considered to be concluded until disclosure of the names of the contracting parties or the acceptance of the broker's note disclosing their names. The present was such a transaction, the names of the plaintiffs were not orally disclosed and upon tender of the broker's note disclosing them the defendant at once refused to complete the contract by accepting the note. The plaintiffs in their replication alleged that, even if the custom set up in the plea was reasonable and well established, the defendant completed the contract of sale upon the broker guaranteeing to him the delivery of the shares. The defendant joined issue.

A good deal of evidence was led as to the facts of the transaction in dispute, but for the purposes of this report a short summary of its effect will be sufficient. It appeared that the shares were offered to the defendant on the morning of Feb. 9 by a broker named Smith "to arrive from Johannesburg within 10 days." Smith stated that he told the defendant he was acting for another broker, who would disclose his principals on the note, and if the defendant was not satisfied he could refer to the Standard Bank. Defendant said "all right." He was not quite sure those were the exact words used but was certain the bargain was closed. Shortly afterwards he sent the defendant the broker's note, upon which the names of the plaintiffs appeared as sellers, the terms of sale being "Cash against scrip to arrive within 10 days from Johannesburg." The defendant refused to accept the note on the ground that he did not know who the plaintiffs were and declined to refer to the Bank. After some discussion the defendant said he would accept the note provided Smith would guarantee delivery. Smith agreed to this and endorsed the note "Delivery guaranteed by me, F. W. Smith," and handed it to the defendant, who however still refused to accept it, and said he would not complete the contract unless Smith substituted his own name as vendor for that of the plaintiffs.

This he declined to do and so the transaction was broken off. The witnesses called for the plaintiffs admitted that, in cases like the present, according to the custom of the market, a purchaser was entitled to refuse to complete the contract if, on the name of the vendor being disclosed, he did not approve of it. There was some evidence that there had been a distinct fall in the market value of the shares during the time which elapsed before the defendant finally refused to accept the broker's note. On the 16th the shares arrived from Johannesburg and, having been tendered to and refused by the defendant, were sold on the 20th at 30s. The evidence was to the effect that the highest price that could have been obtained on the 16th was 32s. The defendant on being called stated that when the shares were offered to him he told Smith he must not close until he (the defendant) had approved of the principals, adding that he had been victimised in a previous case in which a vendor, on the shares going up, had failed to deliver. When he received the note disclosing the names of the plaintiffs, as he knew nothing about them and could learn nothing from several persons of whom he made inquiries, he refused to accept it. At that time there had been no fall in the market price neither, as he asserted, was there to his knowledge throughout the day. He admitted that he told Smith that he would accept the note if he would make it out in his own name as seller, that Smith refused to do this but offered to guarantee delivery and that he then accepted this offer but subsequently refused the note, with Smith's guarantee endorsed, on the ground that the name of the plaintiffs was still on it. He explained that when he had accepted Smith's offer of a guarantee, he had meant that the contract should be made in such a form as to make him personally responsible in the first instance. At the close of the defendant's examination in chief,

LAURENCE, J.P., said that the defendant's evidence appeared to support the allegations in the plaintiffs' replication, as to his undertaking to complete the contract upon the broker guaranteeing delivery of the shares, and asked whether the defence could be carried further.

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*Hopley, C.P.*, for the defendant, said he thought not and would close his case and only address the Court as to damages. He submitted that, the contract having been broken on the 9th, it was the duty of the plaintiffs to resell the shares at once, and if they had done so the damages, as appeared from the evidence, would have been only nominal or at all events very small. [LAURENCE, J.P., observed that the plaintiffs, if they had chosen, might have insisted on specific performance: *Smith and Warren vs. Harris, supra*, p. 193.] But as they did not, they were entitled only to the difference between the contract price and the market price at the time of the breach.

*Solomon*, for the plaintiffs, contended that the breach did not take place until the shares had been tendered and refused. Even if there was a breach on the 9th, the plaintiffs were entitled to hold the shares till the date fixed for performance of the contract and sue for the difference on realisation then. He referred to *Benjamin on Sales*, 2nd ed. 618; *Philpotts vs. Evans*, 5 M. & W. 475; *Mayne on Damages*, 3rd ed. 145-147; *Sedgwick on Damages*, 7th ed. l. 601; *Johnstone vs. Milling*, 16 Q. B. D. 467, *per* ESHER, M.R. He submitted that the difference between the contract price and the market price on the 16th, when the shares were tendered and refused, was the measure of damages in the present case.

LAURENCE, J.P.:—In this case the plaintiffs claim the sum of £180 as damages for the defendant's breach of contract to purchase 300 shares in the Steyn Gold Mining Company. The defendant pleads that the contract was never completed, and that when the shares were offered to him he agreed to accept them only on the condition that he should approve of the principals when disclosed, and that this condition was not fulfilled. He also pleads that by the just and reasonable custom of the share market transactions of this kind—that is to say transactions which are not on an immediate cash basis, but which are in the nature of "time bargains," or in which the shares are to be paid for on their arrival at a later date from some other place—are not considered to be completed until the names of the prin-

cipals have been disclosed, either by delivery of the broker's note or otherwise, and approved of by the purchaser, and that there was no such approval and acceptance in the present case. Now it appears to me that, even on the evidence called for the plaintiffs, these pleas have been practically substantiated. Several brokers were called to give evidence as to the facts, on various portions of the case, and they all stated, in cross-examination or in answer to the Court, that the custom in cases of this kind was as alleged by the defendant. But apart from the question of custom, there seems to be no material contradiction between the version given by the defendant and that given by the broker, Smith, as to what actually took place between them when these shares were offered. The defendant says that he instructed Smith not to close till the principals were disclosed by the broker, Wood, who was acting for them; Smith states that he informed the defendant that Wood said that the names of his principals would appear on the bought note which he would supply in the ordinary course, and that if he was not then satisfied as to their position he could apply to the Bank for information. Whatever may have been the *ipsissima verba* employed, I do not think it could be held that the defendant was bound by what then passed to accept the shares if, on being informed who the vendors were, he did not consider their names satisfactory. If the case rested here I think the defendant would be entitled to succeed. But we have further to deal with the allegation in the plaintiffs' replication that the defendant thereafter completed the contract upon Smith guaranteeing the delivery of the shares. It appears to me that this allegation has been established and after the defendant had given his evidence his counsel admitted that he could not deny that such was the case. It is clear that after a good deal of discussion, into the details of which it is unnecessary to enter, the defendant said that he would accept the note if Smith would put his own name in the contract as vendor. Smith refused to do this, but either offered or agreed on the defendant's request to guarantee delivery of the shares. The defendant admits that he assented to this arrangement, and that thereupon Smith wrote his guarantee on the face of

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the note, thereby complying with the additional condition imposed by the defendant. The defendant, however, again refused to accept the note and reverted to his former demand that Smith's name should be substituted for that of the plaintiffs as the principal in the sale. This it is clear that he was not entitled to do. The defendant having once agreed to accept the shares on the broker guaranteeing delivery, the position was the same as if such had been the terms of the contract *ab initio*. There having thus been a clear breach of contract by the defendant, the only remaining question is as to the measure of damages. As to this, I am bound to say that the authorities quoted by Mr. *Solomon* clearly establish that in a case like the present the vendor has a certain option. He can either tender the shares and sue for the purchase price, as was decided in *Smith and Warren vs. Harris*; or on the purchaser repudiating his bargain he can regard the contract as broken and realise at once; or he is entitled to wait until the time when the contract should have been performed, and then tender the goods sold and, if not then accepted, sell them at the current market price and sue for the difference. In the present case the shares were tendered and refused on the 16th, or within the ten days which the plaintiffs had for delivery from Johannesburg, and it certainly does not appear that in all the circumstances there was any unreasonable delay in making the tender. It appears that on the 16th the highest price obtainable was 32s., and the plaintiffs thus sustained damage to the extent of 10s. per share. The judgment of the Court will therefore be for the plaintiffs for £150 and costs.

SOLOMON, J.:—It is unnecessary for me to add anything to what has been said by the JUDGE PRESIDENT as to the facts of the case. I quite agree in thinking that what passed between the defendant and the broker in the first instance was not sufficient to constitute a complete and binding contract; but it is also clear that the defendant subsequently agreed to accept Smith's guarantee and, after that guarantee had been given, was not entitled to repudiate the contract. The only point as to which I have felt any



doubt was with regard to damages, and I was certainly at first disposed to hold that, as soon as the contract was breached by the purchaser, it became the duty of the seller, if he intended to sue for damages, to realise the shares forthwith and sue for the difference. However, the authorities cited by counsel for the plaintiffs appear to be clear on this point and to shew that the vendor is entitled to wait till the time for performance arrives and, if the bargain is then repudiated, to regard that as the time of the breach, and consequently to recover the difference between the market price on that date and the price fixed by the contract. This is distinctly laid down by the English authorities and it is not suggested that the Colonial law is in any way different in this respect. I therefore concur in thinking that our judgment must be as already stated.

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COLE, J., concurred.

[Plaintiffs' Attorneys, CALDECOTT & BELL.  
Defendant's Attorneys, COGHILAN & COGHILAN.]

KIMBERLEY BOROUGH COUNCIL *vs.*  
DE BEER'S CONSOLIDATED MINES, LD.

*Assessment of depositing floors.*—Act 19, 1883, §§ 35, 81.—  
Act 30, 1884, § 4.

*Owners of claim property within the borough of Kimberley are not liable to municipal rates in respect of depositing sites situated within the mining area and used in connection with their claims.*

This was a special case stated for the decision of the Court in the following terms:—

1. The plaintiffs are the Mayor, Councillors and Burgesses of Kimberley: the defendants are a mining company duly registered and incorporated carrying on business in Kimberley.

2. The defendants are the occupiers of certain two pieces of land situate within the Old De Beers Mining Area in the borough of Kimberley which said pieces of land are held and used by them as

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depositing floors for diamondiferous soil in connection with their claims in the said Old De Beers Mine in terms of the laws and ordinances relating thereto, and which have been assessed by the plaintiffs for municipal purposes at the sums of £26,187 5s. 10d. and £988 15s. respectively for the year 1889.

3. In respect of the said assessment the plaintiffs have duly levied a rate of 3d. in the pound for the year 1889, and they demand and contend that they are entitled to claim from the defendants the sum of £339 14s., being the amount of such rate due in respect of such pieces of land.

4. The defendants on the other hand contend that they are not liable to be rated in respect of such pieces of land inasmuch as the same are situate within the Old De Beers Mining Area and are held and used by them as depositing floors in connection with their said claims as afore-said.

5. If the plaintiffs' contention be upheld then judgment shall be entered for the plaintiffs for the sum of £339 14s. with costs.

6. If the contention of the defendants be upheld then judgment shall be entered for the defendants with costs.

*Lange*, for the plaintiffs, contended that, as depositing sites were not expressly exempted from taxation in the Kimberley Borough Acts, the Council had the right to levy a tax upon them as immovable property within the borough. He referred to Act 30, 1884, § 4, Act 11, 1883, § 72, and Act 19, 1883, § 35.

*Hopley, C.P.*, for the defendants, argued that it was the intention of the Legislature to exempt all property within the mining area from taxation, except in cases where the Council was specifically empowered to impose rates upon such property. In addition to the sections already mentioned he referred to Act 45, 1882, § 115, Act 19, 1883, § 55, Act 30, 1884, § 3, and Ord. 17, 1879, G. W. § 69.

*Lange* replied.

SOLOMON, J.:—The decision of the question raised in this special case appears to me to be free from any doubt or difficulty. That question is whether the defendants are liable to be rated in respect of two pieces of land situated within the Old De Beer's mining area, and used by them as depositing floors in connection with their claims. The determination of this question depends mainly upon the construction to be placed upon § 4 of Act 30, 1884. That section empowers the Council for the purposes therein set forth to assess the value of all immovable property within

the Borough, and to levy a rate on such assessment; and it then in the proviso to the section exempts certain immovable property within the Borough from taxation, and amongst others "any claim in any declared digging or mine within the Borough." Now the word claim is defined in § 81 of Act 19, 1883, to mean "any portion of ground assigned for mining purposes of a size to be from time to time proclaimed by the Governor;" and the plaintiffs contend that under the proviso only the actual portion of ground in the mine, which has been assigned for mining purposes, is exempt from being rated. The answer to this contention is that by § 35 of Act 19, 1883, there is attached to every claim in any mine the right to use an acre of ground for the purpose of a depositing site. The right to use this ground as a depositing site is consequently a real servitude attached to the claim, the portion of ground in the mine being the dominant tenement, and the ground in the proximity of the mine being the servient tenement. Consequently the owner of a claim in a mine is not merely vested with the right to use the claim in the mine for mining purposes, but acquires therewith the right to use an acre of ground in the vicinity of the mine as a depositing site. If therefore the claims in the mine were liable to be rated, the valuer of the claims in assessing their value would be entitled to take that fact into consideration, and to assess not merely the ground in the mine itself but also the servitude which is attached to that portion of ground. That being so it appears to me that when claims in a mine are exempted from taxation, it follows as a matter of course that the owners of those claims are not liable to be rated in respect of the depositing sites used by them in connection with those claims. It has been argued by the plaintiffs' counsel that § 35 of Act 19, 1883, refers only to mines proclaimed after the passing of that Act, but the words of the section are "any mine which may hereafter be established under the provisions of this Act;" and as all the previous statutes referring to mines are repealed by Act 19, 1883, it is clear that thereafter the De Beer's mine became established under the provisions of that Act. And even if this were not so, I think the conclusion to be arrived at upon the construction of the previous Pro-

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clamations and Ordinances would be the same as that which I have already stated. But the matter does not rest here, for, if there were any doubt as to the meaning which is to be attached to the word "claim" in § 4 of Act 30, 1884, that doubt is set at rest by other provisions of the same Act. For in the first place, the further proviso to that section expressly empowers the Council to levy rates upon "all houses and buildings within such mining area." The specific mention of "houses and buildings" would necessarily seem to imply that it was the intention of the Legislature to exclude all other immovable property within the mining area, and consequently to exempt depositing sites from being rated. This inference is further strengthened by a reference to § 72 of Act 11, 1883, which is repealed by § 4 of Act 30, 1884, this section of the later Act being substituted for the earlier one. That section exempted from taxation depositing floors without the mining area; and *a fortiori* one would suppose that the Legislature intended that depositing floors within the mining areas should be exempted, and considered that had been sufficiently provided for by the exemption of the claims themselves. In further support of the conclusion at which we have arrived I might refer to § 3 of Act 30, 1884, which prohibits the Council from exercising any of the powers vested in them within any mining area so as to interfere with the rights and privileges of the claimholders of any mine, or with the rights of the Government, etc. Now one of the powers vested in the Council is the power of rating immovable property and the exercise of such a power is an interference with the rights and privileges of the claimholders. This section, therefore, would in itself appear to prohibit the Council from rating claimholders in respect of their depositing sites within the mining area. In fact the intention of the Legislature apparently was to exclude the Council from any interference or from exercising any of their powers within the mining area except under certain circumstances specifically set forth in the Borough Council Acts. That intention is shewn in the provisions of the old Griqualand West Ordinance 17 of 1879, as well as in the later Acts 11 of 1883 and 30 of 1884. I need only in

addition mention § 55 of Act 19, 1883, which seems to me further to support the contention of the defendants. Our decision, therefore, upon this special case must be in favour of the defendants and judgment will accordingly be entered for the defendants with costs.

COLE, J., concurred.

[Plaintiffs' Attorneys, COGHLAN & COGHLAN.]  
[Defendants' Attorneys, CALDECOTT & BELL.]

MARKS *vs.* THE QUEEN.

*2 re Desblanche*  
1917-18

*Sunday Trading.*—*Barber.*—Ord. 4, 1837, § 1.—Ord. 1, 1838, §§ 2, 3.

*Carrying on the occupation of a barber on Sunday is not "trading" within the meaning of Ordinance 1 of 1838.*

Robert Marks was charged before the Police Magistrate of Kimberley with contravening sect. 2 of Ord. 1 of 1838 by keeping his shop open for the purposes of trade or dealing on the Lord's Day. The evidence was to the effect that on Sunday, May 12, a detective went to the accused's shop and was shaved by his assistant, for which service he paid sixpence. He also asked for a cigar but was informed by the assistant that they did not sell on Sundays. It appeared that the accused had a retail dealer's licence, but for the haircutting business alone it was admitted that no licence was required under the Stamp Acts. The accused was convicted and fined five shillings and now appealed.

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*Solomon*, for the appellant, referring to the terms of the section, said it was clear the accused had not sold or offered for sale any goods, and that it was not a case of dealing; the only question was whether he could be said to have kept open his shop "for the purpose of trade." A barber's business required no licence; Act 3, 1864, sect. 22, defined dealing as "selling or exposing for sale." He contended



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that "trade" in this section derived its meaning from and was controlled by the word with which it was associated, *i.e.* "dealing:" *Maxwell on Statutes*, 2nd ed., 398, 399, and cases there cited. He also referred to *Wharton's Law Lexicon*, s.v. "Trade." Ord. 1 of 1838 repealed Ord. 4 of 1837, which rendered it unlawful on the Lord's Day to "keep open any shop, store, or other place, for the purpose of trade or dealing, or of carrying on therein any handicraft trade." The latter words, which occurred in two passages in the former, were in each case omitted in the later enactment, shewing that the Legislature did not intend it to apply to "handicraft trades," such as the business of a barber. He referred to *Phillips vs. Innes*, 4 C. & F. 234, quoted by *Fisher* at col. 8262. That case might at first appear to be against his contention, but it was decided under the English Act, 29 Car. II. c. 7, which was much stronger and more general in its provisions than the Colonial Ordinance.

*Hopley, C.P.*, for the Crown, contended that trade meant any occupation by which a man gained a living and took money from the public. The section in the Act of 1864 was merely a definition of wholesale dealing. There were many handicraft trades and industries, such as those of a blacksmith, carpenter, tinsmith, etc., for which no licence was required, the policy of the law being against the taxation of manual industry. Licences were required under the Stamp Acts in cases where persons purchased goods in order to resell at a profit. [LAURENCE, J.P., referred to the exceptions contained in sect. 3 of the Ordinance of 1838. All the excepted cases were those of "vending" or supplying to the public certain kinds of goods, from which it might be inferred that the prohibition of the second section was directed only against such dealing, save where expressly excepted.] Except the case already cited, there appeared to be no direct authorities on the subject.

*Solomon* replied.

*Cur. adv. vult.*

*Postea* (June 13), —

LAURENCE, J. P., said :—The short question in this case is whether a hair-dresser or barber, shaving a customer for reward on a Sunday, is guilty of contravening sect. 2 of Ord. 1 of 1838. The material words of the section are as follows :—“It shall not be lawful for any person to sell or offer for sale any goods, merchandize, cattle, or other live-stock, or to trade or deal or keep open any shop, store, or other place for the purpose of trade or dealing . . . on the Lord’s Day.” It was argued for the appellant that shaving was clearly not dealing, and that the word “trade” must be read in connection with and regarded as being qualified or controlled by the subsequent word “dealing.” This argument does not appear to me of much force. I have looked into the passage in *Maxwell* cited by counsel and have also consulted the various authorities there referred to in the note ; but on the whole they appear to me to be substantially illustrations of the general principle of interpretation that wider or more general words, following those which are more particular or specific, must as a rule be construed as applying only to matters *eiusdem generis* with those more particularly expressed. If the former of two words has a clear and precise meaning, I can find no authority for the proposition that such meaning can be regarded as qualified or attenuated by a subsequent word in the same clause. The real question is whether what was done by the appellant was “trading” within the ordinary and natural meaning of that word ; if so, the conviction was right and if not it was wrong. Now the material words appear to me to be the words “to trade or deal ;” the following clause “or to keep open any shop . . . for the purpose of trade or dealing” is clearly meant to cover cases where a shop is proved to have been kept open, contrary to the statute, for the purpose of Sunday trading, but where it is impossible to afford proof that any particular transaction has taken place. In the case before us, proof has been offered of such transaction and the simple question is whether that transaction is covered by the words “to trade or deal.” Now in the first place it seems to me worth noting that we have here to construe the word “trade” used not as a substantive but as a verb ; for I think there might be cases covered by the

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substantive "trade," in its ordinary sense, in which it might not necessarily follow that the verb "to trade" was an accurate description of the transaction. As to what is meant by the verb as here used, some assistance may perhaps be derived, as I pointed out during the argument, from a reference to the exceptions contained in the following section. All those exceptions will be found to be cases of "vending" or supplying goods or provisions, and from this it may perhaps be fairly inferred that what is prohibited in the cases not excepted is also the selling or supplying of goods; or in other words that "to trade" is to do that for which, as the *Crown Prosecutor* argued, the policy of the law requires a licence, namely to buy goods and resell them for the sake of gain or profit to members of the public. For carrying on the business of a haircutter or barber *per se* it is admitted that no such licence is required. Another consideration which seems to point in the same direction is to be derived from the reference which was furnished by Mr. *Solomon*, in the course of his able argument for the appellant, to the provisions of Ord. 4 of 1837, which was repealed by the Ordinance of 1838 under which the appellant was convicted. In the former Ordinance, after words identical with those already quoted from the later enactment, there occurred the following alternative clause—I say alternative, because it begins with the disjunctive conjunction "or"—"or of carrying on therein any handicraft trade." Now if there were no ambiguity in the later Ordinance we should have to apply its provisions irrespective of anything contained in the enactment which it superseded; but as the exact meaning of the verb "to trade" may be open to some doubt, I think our attention was properly directed to the fact that in the previous Ordinance, passed only a year before, the Legislature clearly drew a distinction between "trading" and "carrying on a handicraft trade;" and that, while both proceedings were prohibited by the Ordinance of 1837, the former alone was prohibited by that of 1838. The occupation of a barber may fairly be described as "a handicraft trade;" for the reasons stated it seems very doubtful whether it can also fairly be included in the natural and

ordinary meaning of the verb "to trade." That being so, the principle applies that statutes creating offences and imposing penalties are to be strictly construed and that doubtful cases are to be resolved *in favorem libertatis*. For these reasons we are on the whole of opinion that this appeal must be allowed and the conviction quashed.

SOLOMON and COLE, JJ., concurred.

[Appellant's Attorneys, FRAMES & GRIMMER.]

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## MAGISTRATE'S COURT CASES REVIEWED.

### QUEEN vs. PLOCKEY.

*Indictment.—Stamp Acts.—Broker.*

*A person carrying on the business of a broker without the licence required by the Tariff contained in the Schedule to Act 20 of 1884 is liable to prosecution under sect. 6 of Act 13 of 1870.*

*P. was convicted of broking without a licence. The only evidence was that he had in one case sold and in another received for sale certain ostrich feathers on commission. Held, on review, that the Crown had failed to prove that P. exercised the trade or calling of a broker, as defined by sect. 3 of Act 38 of 1887, and the conviction must therefore be quashed.*

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G. Plockey was charged before the Magistrate of Kimberley with contravening sect. 6 of Act 13 of 1870, as amended by Act 38 of 1887, by exercising the trade or calling of a broker without having taken out the licence required in that behalf. It appeared from the evidence that the accused was a general dealer but had no broker's licence. An excise officer having noticed some ostrich feathers, about 1½ lb. weight, in his store, inquired where he got them from. He said from a licensed feather dealer at Robertson, who had sent them up to be sold for him, but he had not sold and would not sell any, as they would not pay him, and he intended sending them back again. On further inquiries being made, it appeared that the accused, about three weeks before this, had sold a parcel of feathers, weigh-



ing about  $\frac{3}{4}$  lb., for £3 to a licensed dealer, saying he was selling them for a gentleman in the Colony, and was to receive a small commission. On this evidence the accused was convicted and fined £10. The case having come in review before COLE, J., was by him referred to counsel for argument before the Court.

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*Joubert*, for the accused, said that the schedule to Act 3 of 1864, referred to in Act 13 of 1870, sect. 6, did not include brokers, and contended that the charge under that section was therefore bad, at all events in the absence of any reference to the amending Act of 1884. By the 97th Rule of Court it was competent for the accused, under the plea of not guilty, to submit that the facts alleged in the indictment did not amount to the offence charged. On the merits, he referred to the definition of “broker” in Act 38, 1887, sect. 3, and contended that the evidence failed to shew that the accused “carried on the trade or business” of a broker or was in the habit of entering into such transactions.

*Lange*, for the Crown, contended that the Stamp Acts must be read together, and the proceedings were rightly instituted under the Act of 1870. The evidence shewed that this was not an isolated transaction, but that the accused was carrying on the business of broking ostrich feathers, the trade in which was regulated by Act 32 of 1883.

*Cur. adv. vult.*

*Postea* (July 26),—

LAURENCE, J.P., said:—The accused in this case was convicted by the Magistrate of Kimberley on a charge of contravening sect. 6 of Act 13 of 1870, as amended by Act 38 of 1887, by exercising the trade or calling of a broker without having taken out the licence in that behalf required. The case having been argued on review at the request of the Court, it has been submitted firstly that the charge is

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incorrectly drawn, secondly that the evidence does not warrant the conviction. The objection to the form of the charge in my opinion cannot be sustained. The accused having pleaded “not guilty,” and no exception having been taken at the trial, practically the only point which can now be urged, under the 97th Rule of Court, is “that the facts alleged in the indictment do not amount in law to the offence charged against the prisoner.” The point taken is that, while the section under which the accused was charged creates a penalty for the omission to take out a licence in conformity with the Act of 1864 and the schedule thereto, the broker’s licence is required, not under that Act and schedule, but under the corresponding schedule in the subsequent Act of 1884, which should therefore have been referred to in the charge. But by sect. 8 of Act 20 of 1884 and sect. 17 of Act 38 of 1887 it is expressly provided that those Acts shall be read as one with the previous Stamp Acts, and the practical effect is to substitute the tariffs contained in the schedules to those Acts for those in the previous Act, so far as the latter are repealed, and thus ‘Tariff’ 15 of the Act of 1884, in the Act of 1870 as well as for all other purposes, now stands in the place of ‘Tariff’ 15 of the Act of 1864. It is moreover specially provided, if there could otherwise have been any doubt upon this point, by sect. 4 of Act 20 of 1884 that any person who omits to take out the licence required by ‘Tariff’ 15 to the schedule of that Act “shall be considered as a person carrying on an unlicensed trade or business and be liable to the penalty provided by sect. 6 of the Stamp Act of 1870;” while similarly sect. 2 of Act 38 of 1887 provides that “the provisions of the 6th section of Act 13 of 1870 shall *mutatis mutandis* apply to all persons who should, under the provisions of this Act or the Schedule 2 hereof, take out and possess a licence.” For these reasons, although it might perhaps have been better if the charge had contained a special reference to the Act of 1884 as well as or in place of that to the Act of 1887, I think that it is good enough as it stands, and that any person not holding such a licence as is now required by the existing Stamp Act is liable to prosecution under the Act of 1870. The more difficult question is

on the facts as to whether the evidence shews that Plockey exercised the trade or calling of a broker. We have here to be guided by the definition contained in sect. 3 of Act 38 of 1887, which lays down that “‘broker’ means every person (other than an importer or an agent for a foreign firm) who shall in this Colony carry on the trade or business of making bargains and contracts between other persons in matters of trade, commerce, and navigation, for a remuneration commonly called a brokerage.” This definition follows nearly *verbatim* that given in *Wharton’s Law Lexicon*, s.v. ‘Broker,’ where a broker is described as “an agent employed to make bargains and contracts between other persons in matters of trade, commerce and navigation for a compensation commonly called a brokerage.” When we turn to *Wharton’s* definition of “brokerage” we are not much advanced, for we find it explained as “the commission or percentage paid to brokers on the sale or purchase of bills, funds, goods, &c.” Now, such being the definition of “broker” and “brokerage,” it is necessary next to consider the evidence on which the accused was convicted of carrying on the business of broker. It is very short, and is to the effect that on February 27 an excise officer found some ostrich feathers, weighing  $1\frac{1}{2}$  lbs., in the store of the accused. For the possession of these feathers he was bound, under Act 32 of 1883, to give a satisfactory account; and his explanation was that he had received them for sale from a feather dealer at Robertson, but “that he had not sold and would not sell any, as they would not pay him, and he intended sending them back again.” This evidence taken by itself certainly does not shew that the accused had exercised the trade of a broker; he is described in the charge sheet as a “commission agent,” and it only goes to shew that he had received certain goods to sell on commission, but as a matter of fact had not effected any sale. It appears, however, that in consequence of this conversation the excise officer went to a Miss Brown, a dealer in ostrich feathers, and ascertained from her that about three weeks previously she had purchased a certain quantity of feathers, weighing about  $\frac{3}{4}$  lb., from the accused for the sum of £3. The accused told her he was selling for a gentleman in the

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Colony, and was to receive a small commission on the sale. This was the case for the Crown. The witnesses were not cross-examined and there was no evidence for the defence. The whole question is whether the fact that the accused on two occasions was in possession of feathers to sell on commission, and on one of these occasions actually effected a sale, is sufficient to prove that he was carrying on the business of a broker. Now it does not appear from the evidence that when he sold to Miss Brown the accused delivered a broker's note, or mentioned the name of his principal, or that in any other respect his conduct was distinctively that of a broker and not of a commission agent. *Wharton* says of a broker: "Where he is employed to buy or sell goods, he is not entrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name." On the other hand, of a commission agent he says, *s.v.* "commission merchant," quoting *Story on Agency*: "A factor is commonly said to be an agent employed to sell goods or merchandize, consigned or delivered to him by or for his principal for a compensation commonly called factorage or commission. Hence he is often called a commission merchant or consignee, and the goods received by him for sale are called a consignment." Applying these two definitions to the present case, the evidence seems clearly to shew that in the case of the only transaction proved, namely the sale to Miss Brown, the accused, who had the goods in his possession, who passed no broker's note, named no principal, and sold what had been consigned to him on commission, acted not as a broker but as a commission agent; and even if the facts were not so strong in this sense, it might well be doubted whether an isolated transaction of this kind could be regarded as adequate proof of carrying on the trade or business of a broker. The case is certainly one not free from difficulty, and I was at first very much disposed to think that the uncontradicted evidence for the Crown disclosed a *prima facie* case on which the Magistrate was entitled to convict. But as the result of further consideration I am inclined to hold that the evidence does not support the charge, and as both my colleagues are clearly of this opinion the result is

that the conviction will be quashed and the fine paid must be returned.

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SOLOMON, J.:—I am also of opinion that this conviction must be quashed and on the simple ground that there is not sufficient evidence that the accused carried on the trade or business of a broker, even if the transaction which he had with Miss Brown ought to be regarded as a broking transaction within the definition of broking given in the Act of 1887. That definition is certainly very wide, and I am not prepared to say that it would not cover transactions of this kind. It appears that the accused did make a contract on behalf of an undisclosed principal and upon that contract, according to the general principles of law applicable to such matters, the principal if necessary could have sued. He made this contract for remuneration, whether that remuneration was or was not of such a description as would be "commonly called a brokerage." I have no doubt that any mercantile or commercial man would not describe this as a broking transaction, but I am disposed to regard it as within the terms of the Act. But however that may be there is no proof that the accused carried on a business of this kind or was in the habit of entering into such transactions. Of course each case must stand upon its own merits and I shall not attempt to lay down any general rule as to the amount of proof necessary in any particular case in order that the Court may infer, from evidence as to particular transactions, that a trade or calling was being carried on. In the case for instance of a retail trader, keeping open shop, proof of a single purchase might be sufficient evidence that he was carrying on a business. But the case is different of a general dealer who is shewn in one particular instance to have sold a parcel of feathers on commission; it by no means follows that he was carrying on the trade or business of a broker or commission agent. The Legislature might have provided, if it thought fit, as in the case of the Liquor Law and the Diamond Trade Act, that any single transaction by a person not possessing the necessary licence should itself constitute an offence; but as the law stands it is necessary to prove that the accused was carrying on the trade or



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business of a broker, and of this I am of opinion that the evidence is insufficient.

COLE, J.:—The defendant in this case was charged with contravening the Stamp Act by "exercising the trade or calling of a broker" without having a broker's licence. The evidence against him amounts to this. The defendant has the ordinary retail dealer's licence. About the 27th February a detective excise officer entered his store and, seeing some ostrich feathers on the counter, asked defendant where he had got them. Defendant answered that they had been sent to him for sale by a licensed feather dealer at Robertson, but that as the commission on the sale was too small he intended to send them back. Clearly so far the defendant had contravened no law. Acting, I presume, on some information obtained elsewhere the detective went to Miss Brown, a licensed feather-buyer, and found that on the 8th February the accused had sold to her some feathers for £3. As far as her first evidence goes we have the simple fact that she bought, and the accused sold, the feathers, without the slightest reference to any third party; but she was recalled in the Magistrate's Court and then stated that the accused told her he had sold on account of a gentleman in the Colony. On these facts the Magistrate held that the accused had carried on the trade or calling of a broker. I am utterly at a loss to see where there is any brokerage at all in the matter, and I think the whole mercantile community would be with me in saying that there was none. Voet, 50. 14. 1. says of a broker (*proxeneta*) "qui et pararius, et conciliator, et interpres, et medius dicitur." Which was the accused? Certainly not "pararius," who was a negotiator of loans, nor a "conciliator," "interpres" or "medius," all of which terms indicate a "go-between" making bargains between two persons of opposite interests. Every mercantile man knows the distinction between a broker, or go-between bargain-maker, and a commission agent to whom goods are consigned which he is authorised to sell for his principal. This is what the accused was and did according to the evidence taken in the case. He was no more a broker than the agents for the *Cape Times* or *Cape*

*Argus* who sell those papers in Kimberley on behalf of the proprietors, indeed no more a broker than the small boys who sell newspapers in the street also on commission. Reference was made to the definition given in the Act protecting persons selling on commission for foreign firms, which would at first sight seem to imply that all other commission agents are brokers; but the real intention I take to be to protect persons selling *by sample* for foreign firms, which is common enough, and such transactions would undoubtedly be a kind of brokerage. But even if the transaction impugned had come within the definition of brokerage I should agree with the remarks of my brother Judges that one such transaction would not convict the accused of "exercising the trade or calling of a broker." I therefore concur in thinking the conviction must be quashed.

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#### BEACONSFIELD MUNICIPALITY *vs.* EVANS.

*Bye-law.—Municipality.—Penalty.—Act 45, 1882,  
§§ 109, 175.*

*Where a municipal bye-law provided that "the penalty shall be a fine of £10 for each offence or imprisonment for a period of three months:" held, that it was within the discretion of the Court to impose a lower penalty than that specified. Semble, in the absence of such discretion the bye-law would have been unreasonable and therefore void.*

A cab driver named Evans was convicted by the Assistant Magistrate of Beaconsfield, on the prosecution of the Municipality, of contravening sect. 139 of the municipal regulations framed under Act 45 of 1882. The bye-law in question is in the following terms:—

"The driver of every cab, cart or other vehicle, whether plying for hire or not, shall, in the event of any accident caused thereby, whether such accident be the result of knocking down or being run over by, or collision, or any other cause whatever, immediately stop for the purpose of rendering such assistance as may be required. The penalty for non-

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compliance with this bye-law shall be a fine of £10 sterling for each offence, or imprisonment for a period of three months with or without hard labour."

It having been proved that the accused when driving his cart had come into collision with another vehicle and had not stopped to render assistance, the Magistrate fined him £10, or in default three months imprisonment, observing that if the bye-law had allowed him any discretion he should have imposed a very much lighter sentence. The case having come in review before LAURENCE, J.P., was by him referred to counsel for argument before the Court on the questions (1) whether the bye-law allowed any discretion as to the penalty, (2) if not, whether it was reasonable. Counsel were referred to the cases of *R. vs. Nonosi*, 1 A. C. 154, and *R. vs. Muller*, 3 H. C. 490. The case was argued on July 26.

*Joubert*, for the accused, referred to the above cases, and contended that the words "the penalty shall be" in the bye-law were equivalent to the words "shall be liable to a penalty" in the enactments considered in those cases, and which had been held to give a discretionary power as to the penalty to be imposed. [LAURENCE, J.P., observed that, in *R. vs. Nonosi, Cole, Q.C., arguendo*, had mentioned a decision of CLOETE, J., that, under the old Gunpowder Ordinance, where the words were "shall upon conviction forfeit the sum of £500," the Court had discretion to inflict a lower fine. SOLOMON, J., referred to Act 11 of 1875, giving discretionary powers as to penalties under the Gunpowder Ordinance, as shewing that the Legislature had understood the terms of that Ordinance as giving no discretion.] He referred to *Maxwell on Statutes*, 2nd ed. 274 *et seqq.*, as to the power of the Court to modify the language of statutes so as to carry out the presumed intention of the Legislature and submitted that, if the bye-law gave no discretion, it was unreasonable and therefore invalid. He referred to *London and Brighton Railway Company vs. Watson*, 3 C. P. D. *per* COLERIDGE, C.J., at p. 435; *Saunders vs. S. E. Railway Company*, 5 Q. B. D. *per* COCKBURN, C.J., at pp. 463, 464; *Cradock Municipal Commissioners vs. Du Plessis*, 2 E. D. C. 407.

*Lange*, for the Crown, thought that the wording of the bye-law was imperative, and left no discretion as to the penalty, and, if this was so, was disposed to admit, on the authority of *Saunders vs. S. E. Railway Company*, that the bye-law was unreasonable. On the question of penalties he referred to sect. 175 of the Municipal Act of 1882 and, on the general principles of the law relating to bye-laws, to *Barling vs. Town Council of Cape Town*, Buch. 1875, 101; *Hall vs. Victoria West Municipality*, 2 Juta, 113; *Angell and Ames: on Corporations*, §§ 347, 357, 360; *Maxwell on Statutes*, p. 362. [LAURENCE, J.P., referred to *Pickering vs. Kimberley Town Council*, 2 H. C. 374.]

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*Postea* (July 31),—

LAURENCE, J.P., said:—In this case the accused was convicted by the Assistant Magistrate of Beaconsfield of contravening sect. 139 of the Beaconsfield Municipal regulations, framed under the Municipal Act, 1882, under which Act the Municipality of Beaconsfield has been established. The wording of the bye-law in question if examined in detail is open to considerable criticism, but the effect of it is that the driver of any vehicle which causes an accident shall be bound to “immediately stop for the purpose of rendering such assistance as may be required” under a penalty of “a fine of £10 for each offence, or imprisonment for a period of three months with or without hard labour.” The Magistrate sentenced the accused to pay a fine of £10 and in default of payment to undergo three months’ imprisonment. When the case came before me in review I requested the Magistrate to furnish me with a copy of the by-law, and to state whether the fine had been paid. This information, as I have previously had occasion to observe, should always be supplied to the reviewing Judge, as in any case where doubts may arise on the record it is always important to ascertain whether the accused is actually undergoing imprisonment in order in that event to deal with the case as promptly as possible. The Magistrate forwarded a copy of the bye-law,

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stated that the fine had not been paid, and added that "a very much lighter sentence would have been passed had the bye-law allowed him any discretion." The case having been argued on review and judgment having been reserved, it appears to me that there are four points which require consideration: (1) Is the conviction justified by the evidence? (2) Is the bye-law, having regard to its subject matter, one which it was competent for the Municipality to frame? (3) If so, are its provisions reasonable? (4) Does it allow any discretion as to sentence, or is the Magistrate bound in all cases to impose the penalty mentioned in the bye-law? As to the evidence there is only one point which, on reperusing the record, since the case was argued, has struck me as causing some difficulty, and that is that there is no direct evidence that the alleged offence was committed within the limits of the Municipality of Beaconsfield. This point, however, has not been raised either at the trial or during the argument on review on behalf of the accused. The charge alleges that the offence was committed at Beaconsfield; the locality is specified in the evidence, and it may perhaps fairly be presumed that the Magistrate was aware from his local knowledge that the place in question was within the municipal boundaries. In these circumstances, and bearing in mind the decision of the Court on a similar point which was taken on appeal not long ago, I do not think that the Court on review would be justified in setting aside the proceedings on this ground, although in the case of an alleged infringement of a municipal bye-law evidence should certainly have been taken that the *locus in quo* was within the Municipality. The second question is whether the bye-law is one which it was within the power of the Municipality to frame. Their powers in this respect depend upon sect. 109 of the Act of 1882. By clause 11 of this section they are empowered to make bye-laws "for regulating and licensing boatmen, porters, public carriers, carters, cabs and vehicles plying for hire." It appears that in the present case the accused was the driver of a cab having a number and therefore presumably a licence; but the bye-law applies to "the driver of every cab, cart, or other vehicle, whether plying for hire or not." That portion of the bye-law which deals



with vehicles not plying for hire does not appear to be within the authority conferred on the Municipality by clause 11, though it may perhaps fall within clause 26 of the section which empowers them to make bye-laws for regulating "traffic and processions," or possibly within clause 27, which gives similar powers for "generally maintaining the good rule and government of the Municipality." So far, however, as the present case is concerned the bye-law appears to be one which may be regarded as within the competence of the Municipality under clause 11 of sect. 109, and one which, although I am under the impression that its provisions are of a somewhat unusual character, the Court cannot hold to be on that account necessarily unreasonable. This brings me to the third of the four points which, as I have stated, require consideration. Now it is quite unnecessary in the present case to examine in detail the law relating to the power to make bye-laws, which has been so fully discussed in the various cases and authorities which were referred to in the course of the argument. It is settled law that a bye-law to be valid must be reasonable and that, as laid down in *Comyns' Digest*, "a bye-law being entire, if it be unreasonable in any particular, it shall be void for the whole," and *Comyns* gives as an instance "as if the penalty be unreasonable" (*Comyns' Dig.* 'Bye-law,' c. 6 and 7). This being so, the question of the reasonableness of the present bye-law seems to depend on the answer we give to the fourth question, namely, was the Magistrate right in holding that under the bye-law he has no discretion as to the sentence to be imposed? I think that Mr. *Lange* was right in admitting that the absence of such discretion would in itself be sufficient to invalidate the bye-law as unreasonable. It is obvious that the offence which it creates is one of which the gravity and complexion is capable of almost indefinite variation, according to the character and circumstances of each particular accident; and that being so, it is unreasonable to exact in all cases a uniform penalty, and to compel a Magistrate as in the present case to impose a much heavier sentence than in his opinion on the facts before him would be consistent with real and substantial justice. It is true that in Acts of Parliament the discretion of judicial officers is

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sometimes limited, not only with regard to the *maximum* penalty they may impose, but also with regard to the *minimum*. In my own opinion this latter restriction is one open to grave objections on the score of policy, and it is one to effect which by means of a statute very stringent and precise language is required. But if a Legislature chooses to enact what is unreasonable, the Courts are bound to administer the enactment; in the case of bye-laws, framed under statutory authority, the law is otherwise, and such bye-laws if not reasonable will be wholly void. In the case of a bye-law imposing equal penalties for offences of varying gravity, it might be sufficient to observe that, in the terminology of Aristotle, it furnishes an illustration of that absolute equality which is relative inequality and therefore unjust; but without relying on such general considerations for the purposes of the present case, we seem to have an authority which is very much in point in the observations of COCKBURN, C.J., and LUSH, J., in the case of *Saunders vs. S. E. Railway Company*, cited by Mr. Joubert. In that case it was held that a bye-law which imposed a penalty variable according to adventitious circumstances for the same offence was *eo ipso* unreasonable, and on the same principle a bye-law which imposes an identical penalty for a variable offence must equally be held to be unreasonable. And so we come to the fourth and last question: Does this bye-law in fact do so? Now *prima facie* it is not to be presumed that the Governor would approve of an unreasonable bye-law and the principle is to be borne in mind that the Courts will if possible put a reasonable construction on the wording of statutory or other enactments. Is there any reason why we should not do so here, or anything to prevent us from holding that the words "the penalty shall be," &c., are practically equivalent to the words "shall be liable to a penalty, &c."? If that is so, we should of course apply the rule laid down by the Court of Appeal in the case of *R. vs. Nonosi*, and followed in this Court in *R. vs. Muller*, that the greater includes the less, and should accordingly hold that the penalty mentioned in the bye-law is the *maximum*, but not also the *minimum*, which the Magistrate can inflict. On the whole I am of opinion that the words of the regulation

are not such as to debar us from construing them in this manner. The penalty indeed is fixed, but it rests with the Magistrate whether he will or will not impose the full penalty in each particular case. It not infrequently happens that the phrase is used by a prosecutor:—"In this case I do not press for the full penalty"—thus shewing that in common parlance and understanding where the word "penalty" is used it means the highest sanction which the law imposes on any contravention of its provisions, and the utmost liability which the party contravening incurs, but which need not necessarily in all cases be exacted. Reference has been made to the provisions of the old Gunpowder Ordinance of 1853, which enacted that any person contravening it "shall forfeit the sum of £500," and it was pointed out that by passing the Act of 1875 the Legislature shewed that it understood these words as allowing no discretion. This, however, is not in itself conclusive, even if the words were the same. The construction placed by the Legislature on the wording of statutes is not in a case of this kind authoritative; it is the province of the Legislature to make laws and of the Court to interpret them, and it may be that the Act of 1875 was merely declaratory of the existing law. At all events no judicial decision to the contrary has been brought to our notice, while it appears from Mr. *Cole's* argument in *R. vs. Novosi* that CLOETE, J., in one case held that even under the Gunpowder Ordinance the Court had discretion to inflict a fine of less amount than the £500 which according to that Ordinance the person contravening it was to forfeit. Once more, if we look at sect. 175 of the Act of 1882, to which Mr. *Lange* referred in his argument, we find it laid down that "whenever any penalty shall have been imposed under the provisions of this Act or of any bye-law made thereunder, and the person convicted shall not forthwith pay the same, the Court may direct that such person be imprisoned with or without hard labour for a period not exceeding one month, if the penalty imposed do not exceed £5, or not exceeding three months if the penalty be above £5." It appears to me on further consideration that this section is more than right than I at first thought on hearing it cited. The word "penalty" as here

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used seems to refer exclusively to fines as distinguished from imprisonment; and the effect is that where in any bye-law, as in the present case, a pecuniary penalty exceeding £5 is imposed, the Court may, in the exercise of its discretion, sentence to imprisonment in default of payment for any period not exceeding three months. It may indeed be that this section was intended to apply only to contraventions where the Act, or bye-laws made thereunder, imposed a fine without mentioning any alternative; but whatever the intention the wording is general and seems clearly to cover a case like the present, and to expressly confer upon the Court in such a case full discretion as to the period of imprisonment up to a maximum of three months. The result is that in the present case the Magistrate must be held to have had the same discretion as to sentence as he would have had if the case had come before him in his ordinary jurisdiction under Act 20 of 1856; and the Court while confirming the conviction will remit the record to the Magistrate to impose such sentence as, had he conceived that he possessed such discretion, he would have imposed in the first instance. The sentence will of course run from the date of conviction, and probably the Magistrate, bearing in mind the imprisonment which the accused has actually undergone, will be of opinion that a nominal fine will now meet the requirements of the case.

SOLOMON and COLE, JJ., concurred.

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QUEEN vs. TOMMY.

*Magistrate's Jurisdiction.*—*Procl.* 41 of 1872, G. W.—  
*Act* 16, 1882, § 12.

*The jurisdiction of the Additional Magistrate for the District of Kimberley is limited to the area defined by Proclamation 41 of 1872, G.W., this Proclamation not having been*

*impliedly repealed, nor the jurisdiction extended to the whole District, by the provisions of Act 16 of 1882.*

Tommy, a convict at the De Beer's Convict Station in the District of Kimberley, was charged with stealing a diamond. A preliminary examination was taken at the Convict Station by Mr. Robinson, J.P., and the prisoner was committed for trial. The case was then remitted under Act 43 of 1885 by the Acting Crown Prosecutor to Mr. Robinson in his capacity as additional Resident Magistrate of Kimberley at Beaconsfield. The prisoner having been convicted, the case came in review before LAURENCE, J.P., by whom it was referred to counsel for argument on the question whether the Magistrate had jurisdiction to try the case.

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*Frames*, for the prisoner, contended that the Magistrate at Beaconsfield had no jurisdiction, the crime admittedly not having been committed within the area defined by Procl. 41 of 1872, G. W., by which the Additional Magistracy for the District had been created. The only question was whether the Magistrate had been appointed under this Proclamation or under sect. 12 of Act 16 of 1882, by which the Governor was empowered to create any number of Magistrate's courts in the same district, and appoint Additional Magistrates thereto, and apparently without any limitation of their jurisdiction to special areas within such district. The present Magistrate was appointed by Government Notice 127 of 1888, and neither in the notice nor in his letters of appointment was there any reference to the Act of 1882. He contended that Proclamation 41 of 1872 had never been repealed and referred, as to the names of the places therein mentioned, to Proclamation 22 of 1873, G. W. Ordinance 8, 1879, G. W., repealed this Proclamation only so far as certain boundaries of districts were concerned but not as to the names. The only jurisdiction of an Additional Magistrate for this District was that conferred by the original Proclamation, which was neither expressly nor impliedly repealed by Act 16 of 1882. He referred to *Maxwell on Statutes*, 2nd ed. 186, 198, 212, 216, 217, and



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cases there cited; *Fitzgerald vs. Champneys*, 30 L. J. Ch. 782; *Conservators of Thames vs. Hall*, L. R. 3 C. P. 415; *O'Keefe vs. Scott*, 2 H. C. 329; Act 39 of 1877, §§ 20, 27.

*Guerin*, for the Crown, argued that there was no hard and fast rule of construction in these cases. At the time of annexation there were no additional magistrates in the Colony, and when the Act of 1882 was passed the Legislature must be presumed to have had this local Proclamation in view and to have intended to repeal it by the general provision which was then made by sect. 12. [SOLOMON, J. :—If the Proclamation is repealed there is nothing left to constitute a Court, as when the present Magistrate was appointed he was not appointed “to act at any place other than the stated and ordinary place for holding the Court” in terms of the section.] The Legislature must have contemplated a uniform system for the whole Colony and could not have intended to leave the District of Kimberley in an exceptional position. He referred to *Maxwell*, pp. 197, 198, where it was laid down that “the inconvenience or incongruity of keeping two enactments in force has justified the conclusion that one impliedly repealed the other, for the Legislature is presumed not to intend such consequences. . . . An intention to repeal an Act may be gathered from its repugnancy to the general course of subsequent legislation.”

*Frames*, in reply :—The jurisdiction exercised by the Additional Magistrate has been continuous, which would not have been the case if the Act had repealed the Proclamation. No Court of Additional Magistrate has ever been constituted, except that constituted by the Proclamation, to which the original magistrate and his successors in office must be taken to have been appointed.

*Cur. adv. vult.*

*Postea* (Feb. 28),—

LAURENCE, J.P., said :—The prisoner in this case is a convict serving at the De Beer's Convict Station in the District of Kimberley. He was charged with stealing a

diamond, and a preliminary examination was held at the De Beer's Convict Station by Mr. Robinson, who I understand is the visiting Magistrate of that station but who appears to have taken this examination in his capacity as a Justice of the Peace. Tommy was committed for trial and the case was remitted by the Acting Crown Prosecutor under Act 43 of 1885 to the Additional Resident Magistrate of Kimberley at Beaconsfield. This Magistrate is Mr. Robinson, and the case was no doubt remitted to him owing to it being more convenient when practicable for the Magistrate who has taken the depositions to try the case on remittal. Tommy then pleaded guilty and, there being a previous conviction, was sentenced to six months' additional imprisonment and twenty-five lashes. The question which we have now to consider, and which has been fully argued at the request of the Court, is whether this Magistrate had jurisdiction to try the case. I need not deal with any question which might be raised on the plea of guilty as the counsel for the Crown, being desirous of a decision on the main question, has waived any argument which might be raised to the effect that the prisoner by his plea submitted to the jurisdiction of the Court. Now the additional magistracy for this District was first created by Procl. 41 of 1872, which is entitled a "Proclamation establishing Court of Additional Resident Magistrate within District of Kimberley, over areas of farms Dorstfontein (Du Toit's Pan) and Alexandersfontein, and such part of Bultfontein as lies not more than one mile from Bultfontein homestead." The preamble recites that "it is desirable to erect, constitute and establish a Court of Additional Resident Magistrate within the district of Pniel"—it will be observed that the district is described as Kimberley in the title of the Proclamation and as Pniel in the preamble—"and to define the jurisdiction of such additional Resident Magistrate." The marginal note to the Proclamation is "Additional Magistracy at Dutoitspan." Dutoitspan, however, like Kimberley, is not mentioned in the body of the enactment, by which it is declared that "we do hereby erect and establish a Court of Additional Resident Magistrate within the said district of Pniel, and that the said Court

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shall have the full jurisdiction of a Court of Resident Magistrate in all cases, civil and criminal or mixed, arising within the areas following," and then follows a description of the areas as above mentioned. The next Proclamation, 42 of 1872, has been repealed, but it may be referred to historically as shewing that the constitution of this Court was duly approved by the Governor. It is described as a "Proclamation fixing Court of Additional Resident Magistrate within district of Kimberley, at Dutoitspan, on Monday and Thursday in every week," and goes on to recite that "His Excellency has been pleased to approve of the establishment of a Court of Additional Resident Magistrate within the district of Pniel," and provides that "the sittings of the said Court of Additional Resident Magistrate will be held at Dutoitspan" on certain days. Then we come to Proclamations 44 and 45 of 1872 by which it is provided that, the Governor having approved of "the establishment of a Court of Additional Magistrate within the district of Pniel, the sittings whereof shall be held at Dutoitspan," the seat of the resident magistracy, previously at Dutoitspan, should for the future be at "De Beer's New Rush, or Colesberg Kopje or the farm Vooruitzicht within the said district," and provision was also made by these Proclamations for the sitting of both these Courts on certain days. The fact that in the title of some of these Proclamations the District is called "Kimberley," while in the body it is described as "Pniel," would perhaps lead to the inference that these titles were added at a later date, and this indeed sufficiently appears from the title to Proclamation 44 of 1872, which runs as follows:—"Proclamation making Seat of Magistracy for District of Pniel now Kimberley, at De Beer's New Rush, or Colesberg Kopje, also now Kimberley, instead of Du Toit's Pan." On this question of nomenclature we were referred by Mr. *Frames*, in the course of his able argument for the prisoner, to Procl. 22 of 1873, which is a "Proclamation substituting the names of Kimberley, Barkly and Hay for Pniel, Klipdrift and Griquatown, changing New Rush into Kimberley, and altering the limits of the newly-named districts of Kimberley and Barkly." By this Proclamation it was

enacted *inter alia* that "The division and district of Pniel shall henceforth be and be designated the division and district of Kimberley; and the encampment and town heretofore variously known as De Beer's New Rush, the Colesburg Kopje number two, or Vooruitzicht, shall henceforth be and be designated the town of Kimberley." In the collected edition of the Laws of Griqualand West this Proclamation is stated to have been repealed by Ord. 8 of 1879, and such certainly appears at first sight to be the effect of sect. 1 of that Ordinance; but Mr. *Frames* contended as I understood, and as I am inclined to think correctly, that as the object of this Ordinance was merely to alter the boundaries of the Districts and not their names, the words in sect. 1 repealing previous legislation "in so far as the same may conflict with the provisions of this Ordinance in respect of the boundaries of the Divisions and Districts hereinafter mentioned" must be held to refer to the enactments specifically mentioned, and among them to Procl. 22 of 1873, as well as to any conflicting enactments which might be included in the general words, and that the repeal of the former as well as of the latter was only so to speak *pro tanto*. This, however, is a point which, though of some grammatical nicety and perhaps ambiguity, is not of much practical importance, for it is admitted that neither "Kimberley," where the charge in this case was laid, nor the De Beer's Convict Station, where the theft was proved to have been committed, are places within the jurisdiction of the Additional Resident Magistrate as defined by Proclamation 41 of 1872. This defined and limited jurisdiction, I may here incidentally observe, appears to have been specially preserved by the provisions of the Griqualand West Annexation Act, 39 of 1877, which enacts in sect. 20 that "From and after such annexation as aforesaid the Districts of Resident Magistrates existing in the said province at the time of such annexation, and the Courts of Resident Magistrates established in such Districts, shall become and be Districts and Courts of Resident Magistrates of this Colony, and be in the same situation and condition as if such Courts had been created by the 'Resident Magistrates' Court Act, 1856': Provided that nothing in

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this Act contained shall be deemed or taken to affect or alter any of the laws of the said province specially relating to the jurisdiction of such courts or to the procedure of practitioners therein."

The main question, however, which we have to determine is whether this jurisdiction has been enlarged by the provisions of sect. 12 of a subsequent Act, 16 of 1882, by which it is provided that "The Governor may authorize and appoint, to be held in the same district, and at the same time, any number of courts of Resident Magistrates, which the convenience of the public shall require, and may appoint for such district more Resident Magistrates than one, and every magistrate appointed to act at any place other than the stated and ordinary place for holding the court of Resident Magistrate in any district, shall be styled an additional Resident Magistrate." It is contended on behalf of the Crown that this Act had the effect of repealing the Proclamation of 1872, so far at least as it limited the jurisdiction of the additional Resident Magistrate for the District of Kimberley, and that the effect of this Act is to give such Magistrate jurisdiction over the whole district. Now the "Statute Law of Griqualand West" was "published by authority" in 1882, and in this publication Procl. 41 of 1872 stands as unrepealed; but this is a point on which no stress could be laid, even if any special importance were to be attached to the views of the anonymous compiler of this work, as the preface expressly states that "it must be observed that the effect of the legislation of the session of 1882 does not appear in this volume." The Act of 1882, however, does not purport to repeal this Proclamation and it might perhaps be questioned whether the words "other Act" in sect. 1 would include a Proclamation of the Government of Griqualand West. This point, however, is really immaterial, for if there is a clear inconsistency between the two enactments the former must be regarded as having been repealed by implication, though, as has been pointed out, the theory of implied repeal is not favoured in the judicial interpretation of statutes, and if an earlier and a later enactment can be reasonably construed so as to give effect to both it is the duty of the Court to adopt that



course. On this point it is almost sufficient to refer to the passages from *Maxwell* which were cited during the argument, and the authorities quoted by that author when dealing with this subject in Ch. VII. sects. 1-3 of his learned treatise. I may, however, quote one passage at the beginning of sect. 3 at p. 212, where he says:—"It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general Act is not to be construed as repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later law does not abrogate an earlier special one by mere implication. *Generalia specialibus non derogant*; the law does not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words may have their proper operation without it. It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act, or, what is the same thing, by a local custom. Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shews that the attention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one." Bearing in mind these principles of construction, it does not appear to me that there is any such repugnancy or contradiction between these two enactments as to compel the Court to hold that the Proclamation of 1872 or any portion of it was repealed by implication by the Act of 1882. If the Proclamation was repealed *in toto*, the jurisdiction of the additional Magistrate over the area defined in the Proclamation would obviously have ceased to exist when the Act was promulgated and it

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would apparently have been necessary for the Governor, in order to revive the jurisdiction, to appoint a Court and an additional Magistrate under the provisions of sect. 12. This I understand from my brother SOLOMON, who has looked into the *Gazette* notices on the subject, was the course adopted in the case of the District of Cape Town, when the Governor authorised and appointed a Court to be held at Wynberg and appointed an additional Magistrate for the District to act at that place. But in the case of Dutoitspan no such appointment was made, and it is admitted that Mr. Scholtz, who was the additional Magistrate at the time, continued to act without interruption or fresh appointment after the Act was passed. It was, however, contended as I understood on behalf of the Crown that, even if the Proclamation was not repealed, the jurisdiction it conferred was implicitly extended, and that at all events any subsequent appointment to this magistracy must be taken to have been made under the provisions of the later enactment, and that the Magistrate so appointed must be taken, in the absence of anything in sect. 12 to the contrary, to have jurisdiction over the whole district. With regard to this contention we have taken the trouble to obtain not merely the *Gazette* notices, but also the letters of appointment of the gentlemen who since this date have held the office of additional Magistrate of Kimberley—namely Mr. Blenkins, who was appointed on the death of Mr. Scholtz in 1883, Mr. Bradshaw, who was appointed on Mr. Blenkins being transferred in 1884, and Mr. Robinson, the present Magistrate, who was appointed in place of Mr. Bradshaw deceased in 1888, and whose appointment was gazetted in Government Notice 127 published on Feb. 14, 1888. Now on none of these occasions does it appear that any Court was created as provided by sect. 12 of the Act of 1882. Mr. Blenkins was appointed to be "Additional Magistrate for Kimberley at Dutoitspan;" Mr. Bradshaw was appointed to be "Additional Resident Magistrate at Beaconsfield," the Municipality of Beaconsfield having apparently come into existence during the interval between these two appointments; while Mr. Robinson was appointed to be "the Additional Resident Magistrate for the district of Kimberley in the room of

Mr. Bradshaw deceased," the letter of appointment from the Under Colonial Secretary being addressed in this as in Mr. Bradshaw's case to "The Additional Resident Magistrate for Kimberley at Beaconsfield." The conclusion at which I arrive from a consideration of these enactments, and of what has been done by the Executive Council under their provisions, is that the only Court of Additional Magistrate which has ever been created for the district of Kimberley is that created by the Proclamation of 1872, and that the jurisdiction of the Additional Magistrate is consequently limited to the area thereby defined. It is therefore unnecessary for the present purpose to consider what would be the effect if the Governor, without any direct repeal of the old Proclamation, should exercise the powers contained in the Act of 1872 in order to constitute one or more additional Magistrate's Courts for the district of Kimberley, and should appoint an additional Magistrate or Magistrates to act at the place or places thus constituted courts. It is sufficient to say that such powers if capable of exercise have not in fact been exercised (*a*). I may, however, add that something was urged on behalf of the Crown on the argument *ab inconvenienti*; but this is an argument which might be used with at least equal force on the other side; and I am by no means clear that it is for the general convenience that defendants in cases either civil or criminal arising at Kimberley should be liable to be summoned before a Magistrate at Beaconsfield. In cases in which periodical Courts have been established by the Legislature of the Cape Colony, their jurisdiction has been strictly limited to cases arising within defined areas, just as was done in the case of the additional Court created in this district by the local legislative authority; and, if the Courts of additional Magistrates established under the Act of 1882 have jurisdiction over the whole of the Magistracy in which they are established, I see no reason to extend that rule to a district for which other provisions have been expressly made. I am of opinion that in the present case the Court by which the prisoner was convicted was *curia extra iurisdictionem ius*

(*a*) But now see Government Notice No. 243, 1889, published in the *Gazette* of March 19, 1889.

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*dicens*, and that the conviction must therefore be quashed. It is unnecessary for the present at all events to express any opinion as to whether the prisoner could in the circumstances be again prosecuted for the same offence before a competent Court.

SOLOMON, J.:—I agree that the jurisdiction of the Additional Resident Magistrate of Kimberley is limited to the area set forth in Griqualand West Proclamation No. 41, 1872. That Proclamation established a Court of Additional Resident Magistrate in the district of Pniel, and defined the jurisdiction of such Magistrate; and after the passing of the Proclamation Magistrates were from time to time appointed under its provisions. In 1873, by Proclamation 22 of 1873, the name of the district of Pniel was altered, and it was thereafter known as the district of Kimberley; and by Ord. 8, 1879, the limits of the district of Kimberley were changed; but neither Proclamation 22, 1873, nor Ord. 8, 1879, in any way repealed or altered the provisions of Proclamation 41, 1872. This state of things then continued until the passing of Act 16, 1882, and it was argued on behalf of the Crown that the passing of that Act must be taken to have impliedly repealed Procl. 41, 1872, inasmuch as sect. 12 of the Act is repugnant to and inconsistent with the provisions of the Proclamation. That argument, however, appears to me to be wholly untenable. I need not recite the words of this section which have already been quoted; but I am at a loss to see how these provisions, which are purely permissive, conferring certain powers upon the Governor which he may exercise or not as he pleases can be said to have *ipso facto* repealed the express provisions of Procl. 41, 1872. If this section instead of being merely permissive had actually established and constituted Courts of Additional Resident Magistrates in the several districts of the Colony, then no doubt it might fairly have been argued that Procl. 41, 1872, had been thereby repealed. But even then I do not think that I should have been prepared to hold that a general section of that nature was intended to override the express provisions of a special enactment relating to one of the



districts of the Colony, establishing a Court of Additional Resident Magistrate for such district with defined jurisdiction. But however that might have been I certainly do not think that as the section now stands there is anything in it which is so repugnant to or inconsistent with the Proclamation as to have impliedly repealed its provisions. The most as it appears to me that can be said on behalf of the Crown is that although Procl. 41, 1872, may not be repealed, the Governor has the power under Act 16, 1882, to appoint an Additional Resident Magistrate of Kimberley under sect. 12 of that Act, and that such an appointment would confer upon him jurisdiction over the whole district instead of over the limited area defined by the Proclamation. Of course it might still be argued on the other side that, even if the appointment were expressly made under the provisions of Act 16, 1882, the jurisdiction of the Magistrate would be limited to the area set forth in the Proclamation. But without going into that point it is sufficient to say that there is nothing to shew that the appointment of the present Additional Resident Magistrate was made under the Act 16, 1882. The appointment itself makes no mention of any Act or Proclamation, and in the absence of any expression of intention on this point I should certainly say that the presumption is that the Additional Resident Magistrate was appointed rather under the Proclamation which was specially framed for the purpose of establishing a Court of Additional Resident Magistrate for the district of Kimberley than under an Act which provides generally for appointing Additional Resident Magistrates throughout the Colony. But the matter does not rest here, for if we take a short historical retrospect all difficulty in the matter appears to me to be completely set at rest. When Act 16, 1882, was promulgated, the Additional Resident Magistrate, Mr. Scholtz, who had been appointed under the Procl. 41, 1872, had jurisdiction merely over the area defined in the Proclamation. It is admitted that thereafter until his death no new Court was established under Act 16, 1882, nor did he obtain any fresh appointment; so that clearly so long as he was in office his jurisdiction was limited by Procl. 41, 1872. On his death in 1883, Mr. Blenkins was appointed Additional Resident

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Magistrate for the district of Kimberley. The notice of his appointment is contained in the *Gazette* of May 8, 1883, which sets forth that the Governor has been pleased to appoint Mr. Blenkins to be Additional Resident Magistrate of Kimberley at Du Toit's Pan *vice* R. I. Scholtz, deceased. If then Scholtz's jurisdiction was limited to the area defined in the Proclamation, clearly Blenkins who was appointed as his successor in office had exactly the same jurisdiction and no more. Blenkins was succeeded in office by Bradshaw, and Bradshaw by the present Additional Resident Magistrate, Robinson, and in each case the words of the appointment are practically the same. Clearly then Robinson as Additional Resident Magistrate is directly the successor of Scholtz and has the same jurisdiction as Scholtz had at the time of his death, that is to say, the jurisdiction defined by Procl. 41, 1872. I am, therefore, of opinion that in the present case as the offence was committed beyond the limits of this defined area the Additional Resident Magistrate had no jurisdiction to try the prisoner.

COLE, J.:—While not dissenting from the conclusion at which my learned brethren have arrived, I feel bound to express my opinion that it was only through an oversight on the part of the Legislature that this Proclamation of the former Government of Griqualand West has been left unrepealed. I think that when the Act of 1882 was passed it was intended to make a general provision which would apply to this as well as to the other districts of the Colony, and I cannot help regarding it as unfortunate that, through what I regard as an oversight, the provisions of that Act must be regarded as not being in force within this district. There is quite sufficient work at Kimberley for it to be desirable that there should not merely be an Assistant Magistrate but also an Additional Magistrate with full powers as contemplated by the Act.

VOL. V.]

[PART III.

REPORTS OF CASES  
DECIDED  
IN THE HIGH COURT  
OF  
GRIQUALAND.

REPORTED BY

P. M. LAURENCE, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPR OF GOOD HOPE.

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VOL. V.—PART III.

JULY to DECEMBER, 1889.

J. C. J U T A & C O.

CAPETOWN.

JOHANNESBURG.

1890.

# HIGH COURT OF GRIQUALAND.

JULY TO DECEMBER, 1889.

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P. M. LAURENCE [Judge President].

W. H. SOLOMON\* [First Puisne Judge].

A. W. COLE [Second Puisne Judge].

W. M. HOPLEY [Crown Prosecutor].

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\* Absent on leave from September 1.

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the period required prior to his admission as an attorney. The Court, on the authority of previous decisions, granted the application but only on condition that I. served his present articles for two consecutive years before applying for admission. Must a candidate for admission as an attorney, who has obtained the LL.B. degree, also pass the lower University examination for the certificate of proficiency in law and jurisprudence? [*Not decided.*] *Semble*, the provisions of Ord. 10, 1879, G. W., § 2, with regard to the continuity of "mixed service," are no longer in force since the annexation of Griqualand West under Act 39 of 1877. *Ex p. Irving* .. .. . 405

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<p> <b>NEGLIGENCE.—Embankment.—Flooding.</b>—M. sued the Dutoitspan Mining Board for damages sustained owing to the flooding of his premises, which he attributed to the negligence of the defendants in making a certain embankment and road without providing a sufficient outlet for the surface water. The defendants, while admitting the flooding, pleaded that the embankment in question had not increased the obstruction to the flow of water in that locality previously caused by other constructions not under their control, and further alleged that the culvert they had made in their embankment would have proved sufficient had it not been for the bursting of a certain drain, for which they were not responsible, which had caused a large quantity of extraneous water to flow in this direction, and also for the fact that their culvert had been blocked up by a cask which had been washed into it, and which without any negligence on their part had prevented the escape of the water and so caused the damage. <i>Held</i>, on the facts, that the dimensions of the culvert made by the defendants were insufficient to provide for the escape of the water which in the event of heavy rain might be expected to flow in this direction, irrespective of any extraneous water or accidental obstruction; that the defendants had therefore been guilty of negligence, and as the inadequacy of their culvert was the immediate cause of the flooding must be held responsible therefor, notwithstanding the circumstance that the escape of water in this direction had been formerly impeded by other constructions of a similar character, the owners of which, previous to the erection by the defendants of their embankment, might have been held responsible for any resulting damage. <i>Margoschis vs. Dutoitspan Mining Board</i> .. .. 469 </p>					
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<p> <b>— 16, 1847.</b>—<i>Act 29, 1889, § 2.</i>—<i>Trespass.—Measure of Damages.</i>            —Certain cattle, the property of D., having trespassed on F's land, the damages were assessed, in the manner provided by the Pound Ordinance, at £7 17s. 6d., together with £1 2s. 6d. as expenses of the award. While the cattle were being driven to the pound, they were rescued by O., acting in concert with D., and the latter, who lived beyond the jurisdiction, recovered possession of them. O. was prosecuted under sect. 31 of the Ordinance and fined £5, which was paid to F., who subsequently sued him for damages. The Magistrate granted absolution on the ground that no damage had been proved. <i>Held</i>, on appeal, that there was <i>prima facie</i> evidence of damage exceeding the amount of the fine and that the case must therefore be remitted for further hearing. <i>Fourie vs. Ollett</i> .. .. 454 </p>					
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VILLAGE MANAGEMENT BOARD.— <i>Quo Warranto</i> .— <i>Election</i> .— <i>Returning Officer</i> .— <i>Relator</i> .— <i>Estoppel</i> .— <i>Acquiescence</i> .— <i>Acts</i> 29, 1881, 28, 1882, 7, 1884.—At an election of a Village Management Board, no voters' list had been prepared by the Magistrate in the manner prescribed by law but a list was used which contained the names of all persons legally qualified to vote. This list had been prepared by R., who was an unsuccessful candidate at the election, and who thereupon applied to the Court to set it aside, on the grounds <i>inter alia</i> of the absence of a proper voters' list and also that the chairman of the meeting and returning officer, D., had himself been nominated and elected as one of the members of the Board. It appeared that D. was the only person qualified, as a Justice of the Peace, to preside at the meeting and that on this as on previous occasions he had done so and been a candidate without any objection being taken. The votes had been checked by scrutineers appointed by the meeting and R. had admitted the correctness of the result. The Court refused to set aside the election. <i>Rothman vs. Du Preez and others</i> .. .. .	420
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# CASES DECIDED

IN THE

## HIGH COURT OF GRIQUALAND.

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### VOL. V. PART III.

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ROLFES, NEBEL & CO. *vs.* BROWNE.

*Practice.—Partnership.—Joint liability.—Exception of non-joinder.*

*R. supplied certain goods to B. and P., who were alleged to be partners, and, P. having gone away, sued B. for their value in the Magistrate's Court. B. pleaded denial but at the close of the plaintiffs' case applied for and obtained absolution from the instance on the ground of the non-joinder of P. Held, on appeal, that, no exception of non-joinder having been taken to the summons, the judgment of absolution was erroneous, and the case must be remitted to the Magistrate for further hearing.*

This was an appeal from the Assistant Magistrate of Kimberley, before whom the plaintiffs had sued the defendant for £47 16s. for goods sold and delivered. The defendant pleaded a denial of the debt. It appeared from the evidence for the plaintiffs that the defendant had stated that he was going into partnership with one Primmer as contractors for the supply of refreshments during a cricket tournament and the plaintiffs had accordingly sold wines, spirits, etc. to the amount claimed, the delivery notes being

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addressed to "Messrs Browne and Primmer," and the receipts for the goods delivered having been signed by Primmer. The defendant subsequently admitted that he was liable jointly with Primmer, who was said to have gone to the Gold Fields. When the defendant pleaded to the claim, he had no legal representative; but, the hearing having been adjourned, an attorney appeared on his behalf who, on the closing of the case for the plaintiffs, applied for absolution from the instance on the ground that it was a partnership transaction and the other partner had not been joined. The Magistrate on this ground granted absolution with costs and the plaintiffs appealed.

*Solomon*, for the appellants, argued that the exception of non-joinder should have been taken *in limine*, and not by way of application for absolution after the close of the plaintiffs' case. He referred to *Voet*, 44, 1, 6; *Bekker vs. Meyring*, 2 Menz. 436; *Dicey on Parties*, 1st Ed. 230, 506. The only defence raised by the plea was a denial of the debt and this could not be supported by evidence that the contract was a joint one: *Rice vs. Shute*, 1 Sm. L. C. 6th Ed. 511 and note, at p. 517; *Knysna Wharf Co. vs. Holbery*, 1 Juta, 311. [LAURENCE, J.P., referred to *Haarhoff vs. Cape of Good Hope Bank*, 4 H. C. 304 and cases cited at p. 312.]

*Hopley, C.P., contra*, admitted that the objection should have been taken by way of exception, but the rules of pleading were not to be too rigidly construed in Magistrates' Court cases. In the present case when the respondent pleaded he had no legal adviser. The rule that a plea in abatement should be taken at the beginning of the case was intended to protect the plaintiff from surprise, but in this case the plaintiffs knew perfectly well that it was a joint transaction, and it appeared from the evidence that Primmer was the person held out as responsible for the liquor supplied. According to the evidence, Primmer's wife was carrying on his business here and the Magistrate must be presumed to have held that he was still domiciled here. [The COURT pointed out that even if the exception had been taken at the proper time, it did not appear that



the defendant would in the end have derived any substantial advantage from its being sustained.] Still the plaintiffs should have brought their action in proper form and the defendant was entitled to the benefit of any legal defence.

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*Solomon*, in reply, referred to *Auret's Trustee vs. Pienaar*, 3 Juta, 40. If this was a joint transaction, the defendant could have been sued without joinder for his *pro rata* share, and if a partnership he is liable *in solidum* and therefore not prejudiced by the non-joinder.

LAURENCE, J.P.:—There can be no doubt as to the correctness of the principle, contended for on behalf of the appellants, that the non-joinder of one who should have been made a co-defendant is in the nature of a dilatory exception and should therefore be taken *initio litis*; and the only difficulty that I have felt is as to the extent to which these rules of procedure should be insisted on and enforced in the practice in Magistrates' Courts, where parties cannot be expected to be always in a position to avail themselves of the best legal advice. For this reason, if in the present case it could be shewn that the defendant would be prejudiced by a strict adherence to the rule, I should not be disposed to press it too far, but should rather incline to regard the judgment as practically equivalent to one of "exception of non joinder sustained," and to alter its form accordingly. But if this were done in the present case, it does not appear that it would in any way affect the question of the defendant's ultimate liability but would simply involve the additional expense of beginning the action *de novo*. If this is to be regarded as a joint liability, the defendant could clearly be sued for his share without joining Primmer as a co-defendant; if on the other hand, as the Magistrate seems to have held, there was a partnership and the other partner has not ceased to be domiciled within the jurisdiction, the plaintiffs would simply have to join him and serve him with the summons in the ordinary manner, and the defendant would still be liable to execution for the whole amount of the debt. In these circumstances, and as it is clear that the judgment of absolution was technically wrong, the appeal

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must be allowed with costs and the case remitted to the Magistrate for further hearing, the costs in the Court below to abide the result.

SOLOMON and COLE, JJ., concurred.

[Appellants' Attorneys, CALDECOTT & BELL.  
Respondent's Attorney, BEEVOR.]

FOURIE vs. SMITH.

*Defamation.—Costs.*

*F.*, having impounded certain mules belonging to *S.*, the latter, in the presence of witnesses, charged *F.* with being a vagabond and a rascal, and added that, having squandered his money in litigation, he was now endeavouring by unlawfully impounding the mules to obtain money with which to procure drink. *F.* thereupon sued *S.* for slander and *S.* pleaded the general issue and also brought a counterclaim for wrongfully impounding the mules. The Magistrate, after hearing the evidence for the plaintiff, intimated that he was prepared to dismiss the case on the ground of its triviality, and suggested that the counterclaim should be withdrawn and, this having been done, gave judgment for the defendant with costs. Held, on appeal, that a *prima facie* case of defamation had been made out, and the case must therefore be remitted to the Magistrate for further hearing, all costs to abide the result.

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J. Fourie sued G. Smith before the Resident Magistrate of Beaconsfield for slander. It appeared that the plaintiff had impounded some mules belonging to the defendant, and some discussion took place between them on the subject, in the presence of one Lourens and one of the plaintiff's sons, in the course of which the defendant, speaking in Dutch, used expressions to the following effect: "You are a vagabond and an old rascal (*schelm*), you were an old rascal

when you came from Caledon; you have spent all your money on going to law (*witproceedeerd*), and have now nothing to buy drink, so you try to get money out of my pocket by unlawfully (*onwettig*) impounding my mules." The plaintiff sued for £20 damages for defamation of character. The defendant pleaded the general issue, and brought a counterclaim for £5 damages for unlawfully impounding the mules. The plaintiff and his witnesses proved the use of the words complained of, and Lourens said that the imputation had affected his opinion of the plaintiff. The defendant, on a suggestion from the Magistrate, called no witnesses, and withdrew the counterclaim, and judgment was then given for the defendant with costs. Against this judgment the plaintiff appealed. The Magistrate in his reasons said: "After hearing the evidence for the plaintiff, the case seemed to me so trivial and absurd that I was much surprised it had ever been brought into Court, and I had no hesitation in dismissing it."

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*Solomon*, for the appellant, argued that the language was actionable, and that whatever, according to English law, would support an action of libel was sufficient, according to the Colonial law, to support an action for verbal defamation. He referred to Webster's English Dictionary and Calisch's Dutch Dictionary to shew that the words "vagabond" and "schelm" were always used in an injurious sense. Moreover the latter part of the slander shewed the sense in which the former words were used. There was a clear imputation that the plaintiff was guilty of deliberate dishonesty and unlawful conduct in order to obtain means to gratify his desire for drink. There was no plea that the words were used *in rixa* or by way of retort under provocation, neither was there any evidence to that effect, and the Magistrate should at all events have given the plaintiff nominal damages and costs.

*Hopley, C.P.*, for the respondent, contended that the words first complained of were merely vulgar abuse and not actionable, while as to the more specific charge made by the defendant it was in fact made as an assertion of his legal rights. To say that a man had acted unlawfully was no slander, nor yet to add that his object was to procure drink.

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The case was one on which the Magistrate, like a jury, was entitled to exercise his discretion, and he had not acted unreasonably in dismissing the claim. If the Court thought otherwise, the case should be remitted in order to afford the defendant an opportunity of giving evidence, as it was on a suggestion of the Magistrate, and on his expression of opinion that there was no case, that the counterclaim had been withdrawn. He referred to *Powel vs. Price*, 1 Menz. 500, and *Wolff vs. Van Hellings*, *ib.* 529.

*Solomon*, in reply, referred to *Cooper vs. Nixon*, Buch. 1874, 5.

LAURENCE, J.P.:—This is a case in which I certainly feel considerable reluctance and hesitation in interfering with the decision of the Magistrate and should be glad, if possible, to support it. The Magistrate however, as appears from his reasons, has dismissed the case simply because he considered it “trivial and absurd” and, an appeal having been brought, we have now to decide whether sufficient ground has been shewn for the judgment which he delivered. Now it seems to me that if this were a case of libel, tried in the English Courts at *nisi prius*, the first question which the Judge would have to leave to the jury would be whether it was a libel or not; and the jury might in certain cases find that there was a libel, but at the same time that it was of so “trivial and absurd” a character that the requirements of the case would be satisfied by a verdict for merely nominal or even contemptuous damages. And if the Magistrate in the present case had arrived at such a conclusion, I do not think this Court would have been either able or willing to interfere with his decision. The first question, as I have said, is whether the words, the use of which does not seem to have been disputed, were defamatory or not. As the plaintiff’s counsel admitted, it is clear that they do not fall within any of the categories which would support an action for verbal slander under the English law. But he went on to contend that anything which was libellous under English law would support an action for verbal as well as for written defamation under the law of this Colony. Well, that is a very broad proposition, to



which I do not wish to be understood to assent, and I should prefer to adhere to the more qualified view of the subject which, after discussing the authorities, I expressed in a considered judgment in the case of *Rojesky vs. Ross*, 4 H.C. at pp. 159, 160, and which it is therefore unnecessary to now repeat. Now it seems to me that if the defendant had confined himself to calling the plaintiff, in the presence of witnesses, a "vagabond" and a "schelm," this would have been "mere vulgar abuse," and it would be intolerable if actions could be brought on every occasion when such language was employed. Neither is the case carried any further by the defendant's subsequent remark to the effect that the plaintiff's rascality was of no recent origin, but had characterized his conduct when, or before, he came from Caledon, whenever that may have been. Then he went on to say that the plaintiff had wasted his substance in litigation; but this also was not in itself actionable, and I think that counsel, for the sake of the profession, ought scarcely to contend that it is a slander to describe a man as possessing a litigious temperament. The *gravamen* of the charge, however, appears to lie in the concluding words, and even as to these it may be said that the defendant was perfectly entitled to express his opinion that the plaintiff's conduct in impounding his mules was an unlawful proceeding. But when he went on to allege not only that the plaintiff's conduct was unlawful, but that he was actuated by a sinister motive, namely, that of extorting money from his neighbour's pocket with which to satisfy his craving for drink—for that seems to be the only reasonable construction of the language employed—I am bound to say that such language, used of a father in the presence of his son and also of a third party, who evidently regarded it as conveying a serious imputation, appears to me to be defamatory language, and therefore language for the use of which the plaintiff, if he thought it worth while, and however low might be the measure of damages, was entitled to bring his action. On this point therefore the Magistrate's judgment cannot be supported; but as it appears that it was in consequence of the view taken by the Magistrate of the plaintiff's case that the defendant abstained from calling any

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evidence, I think it is only fair that an opportunity should now be afforded him of doing so. The Court therefore will remit the case to the Magistrate for further hearing, with an intimation that a *prima facie* case of defamation has been made out, and that the defendant should therefore have an opportunity of giving evidence, if he wishes to do so, in support either of his plea or of his counterclaim or of both. I think that the costs, including the costs of this appeal, should abide the result.

SOLOMON and COLE, JJ., concurred.

[Appellant's Attorney, D. J. HAARHOFF.  
Respondent's Attorney, DE KOCK.]

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RAUDIESS vs. RAAFF.

*Pleading.—Exception.—Gaoler.—Civil Imprisonment.—Act 20, 1856, § 18.—Computation of Time.—Custom.*

*A. sued B., a gaoler, for damages caused by the unlawful discharge of C., against whom A. had obtained a decree of civil imprisonment. B. pleaded that, while the law requires the maintenance of such prisoners to be paid for weekly in advance, the instalment due on a certain day had not been paid by noon of that day, and that he had thereupon discharged the prisoner, as he was by law entitled to do, it being the invariable practice of the gaol in cases of this kind to reckon each day as ending at noon and every fraction of a day elapsing before noon as a whole or completed day. Held, on exception, that the plea was bad.*

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Argument on exception. The plaintiff sued the defendant, who was the gaoler at Kimberley, for damages for the unlawful release of one Collins, against whom the plaintiff had obtained a decree of civil imprisonment for a judgment debt. The declaration alleged that Collins had been duly arrested on June 25, and on that date placed in the custody

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of the defendant by the Messenger of the Magistrate's Court, but on July 1 following the defendant had wrongfully and unlawfully released him before he had paid the debt, and before the expiration of the period for which the decree had been granted by the Magistrate, and without having any authority for such discharge, whereby the plaintiff had sustained damage. The defendant pleaded that Collins was handed over to his charge at 9.30 A.M. on June 25, together with the sum of 17s. 6d. for his maintenance for seven days. The next paragraph of the plea, paragraph 3, was as follows :—

“The defendant further says that the invariable practice in the said Kimberley Prison—which practice he found established upon his appointment as gaoler in the said prison and which he has continued ever since—with regard to persons undergoing terms of civil imprisonment by virtue of warrants issued by the Resident Magistrate has been to reckon each day of imprisonment as ending at 12 o'clock noon, and all fractions of a day elapsing before 12 o'clock noon as a whole or completed day, and to discharge at the said hour of noon all such persons as were then entitled to be discharged or whom the gaoler might then lawfully discharge.”

The plea went on to allege that the period of seven days for which maintenance money had been paid in advance as required by law expired at noon on July 1, and at that time no further sum for maintenance had been paid to the defendant, whereupon he discharged the said Collins as, by virtue of the provisions of section 18 of Act 20 of 1856, as qualified by the tariff of fees and charges established by Ord. 20, 1874, G. W., he lawfully might do and this was the grievance complained of. The defendant added that he had acted without negligence and *bonâ fide* in accordance with the said practice above set forth. The plaintiff excepted to the third paragraph of the plea on the ground that, even if the facts stated therein were correct, they afforded no answer to the declaration.

*Solomon* appeared for the plaintiff.

The COURT, after reading the plea, called on

*Hopley, C.P.*, for the defendant, who submitted as a

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matter of practice that, instead of excepting, the plaintiff should have applied to strike out the paragraph complained of as irrelevant. [LAURENCE, J.P., said that the point taken seemed to go to the root of the defence as pleaded and could therefore properly be raised by way of exception.] He then argued that the defence raised was a good plea of custom, which could modify the general rule of law that the day terminates at midnight. The plea was that the practice was invariable in the case of civil prisoners under Magistrate's Court decrees, and on the face of it it was reasonable, for the gaoler could not be expected to discharge prisoners at midnight. The custom being invariable, the plaintiff's agent must be taken to have been aware of it and, the rule as to the payment of maintenance money in advance not having been complied with, the defence pleaded, taken as a whole, shewed good ground for the discharge complained of.

LAURENCE, J.P.:—It is clear that this exception must be allowed. Collins having been given into the defendant's custody on the morning of June 25, and the maintenance money having then been paid for a week in advance, as required by law, it must be taken to have been paid up to and including July 1; and if in the course of that day no further payment had been made, the gaoler would have been entitled at its expiration to discharge the prisoner forthwith, as provided by sect 18 of Act 20 of 1856. But he took it upon himself to discharge him at noon on that day and now pleads that in doing so he acted in accordance with "the invariable practice in the said Kimberley prison." Now if a defence of custom is to be set up, the custom must be of a reasonable, general, and notorious character. It seems impossible to describe in such terms a practice prevailing in a particular prison; at all events it is not so described in the plea now excepted to, and even if it had been it is extremely doubtful whether such a "practice" could be allowed to override the general principles of law with regard to the computation of time. The exception must therefore be allowed with costs but the defendant will have leave to amend his plea within 48 hours. I would however suggest that, as the case is obviously one in which it would be

unfortunate if avoidable expense were incurred, and as, on the facts as alleged, it does not appear likely that the amount of damage provable at the trial would be very great, it may be worth while for the defendant to consider whether, in the circumstances, the more prudent course would not be to make some reasonable tender to the plaintiff.

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SOLOMON and COLE, JJ., concurred.

[Plaintiff's Attorney, D. J. HAARHOFF.  
Defendant's Attorneys, COGHLAN & COGHLAN. ]

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*Attorney.—Judge's clerk.—Rules of Court* 149, 152.—*Ord.* 10, 1879, *G. W.*, § 2.—*Acts* 4 of 1858, 12 of 1858, 16 of 1873, 39 of 1877 and 27 of 1883.

*I. served as clerk to a Judge for two years and a half. After an interval of over five years, during which he served as clerk to a barrister, obtained the University degrees in Arts and Law and was admitted as an advocate, he applied to have his name removed from the roll of advocates and became articled to an attorney. A year afterwards, he applied for an order allowing him to count his service with the Judge towards the period required prior to his admission as an attorney. The Court, on the authority of previous decisions, granted the application but only on condition that I. served his present articles for two consecutive years before applying for admission.*

*Must a candidate for admission as an attorney, who has obtained the LL.B. degree, also pass the lower University examination for the certificate of proficiency in law and jurisprudence?* [Not decided.]

*Semble, the provisions of Ord. 10, 1879, G. W., § 2, with regard to the continuity of "mixed service," are no longer in force since the annexation of Griqualand West under Act 39 of 1877.*

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This was a petition for an order that the applicant's period of service as clerk to a judge might be taken into account in calculating the period of service as an articled clerk required by law prior to his admission as an attorney. The petition stated that the applicant who, in June, 1880, had matriculated in the Cape University, in the following October was appointed Clerk to Mr. Justice Barry, Judge President of the Eastern Districts Court, which position he resigned in March, 1883, with a view to pursuing his studies and ultimately passing the University examination for the degree of Bachelor of Laws. In June 1883 he passed the University Intermediate examination in Arts, and in 1884 graduated as a Bachelor of Arts, it being necessary, under the University regulations, for candidates to obtain this degree before proceeding to that in law. He then resumed his legal studies as clerk to an advocate practising before the Eastern Districts Court at Grahamstown, with whom he continued for a period of about two years, viz., from July 1884 to July 1886, and by whom he was instructed in the knowledge and practice of the law, but his appointment as clerk to the said advocate was not in writing. In June 1885 he passed the preliminary and in June 1886 the final examination for the degree of Bachelor of Laws and shortly after passing the latter examination, which entitled him to admission as an advocate, was so admitted and enrolled. He continued to practice as an advocate till July 1888, when he applied to have his name removed from the roll, with the view of being articled to an attorney, and immediately after obtaining this order became articled to an attorney of the High Court whom he had duly served as clerk up to the present date. He now applied as above.

*Solomon*, for the petitioner, said that the object of the application was to enable the applicant, by adding the period of his service as clerk to a Judge to that of his present articles, to apply for his admission forthwith as an attorney. He referred to the provisions of Rule of Court 152 and the recent case of *ex p. Kotze*, reported in the *Cape Times* of August 13, 1889, where the Supreme Court on the authority of previous decisions had held the provisions of the above



rule, as to service with a Judge, to apply to cases where the candidate had passed the University examination and accordingly applied for admission as an attorney after three years' service instead of five. The only distinction in the present case was that the service had not been continuous, but the Court had in several cases dispensed with continuity where sufficient cause for the interruption had been shewn. He referred to *In re Lance*, Buch. 1879, 78; *In re Johnson*, 1 Juta, 40; *Ex p. Smith*, 4 Juta, 170; *Ex p. Van Zyl*, 6 Juta, 316. [LAURENCE, J.P., suggested that the reason for requiring continuity of service was to ensure continuity of legal studies, a requirement which might fairly be held to have been substantially fulfilled in the present case.] The facts stated in the petition shewed that the case was a very strong one on the merits.

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*Guerin*, who was instructed to oppose on behalf of the Incorporated Law Society, who had been served with notice of the application, said that this was not an application under the Rule of Court, but under sect. 3 of Act 12 of 1858, which required service for "three consecutive years" as a condition of eligibility for admission. This was a stronger expression than "continued to be actually employed" in Rule 149, to which Rule 152 referred. In *Kotze's* case the service had been continuous, and if this were a case of five years' service the authorities cited would doubtless cover it; but the application was admittedly made with a view to admission after three years, which was regulated by the express words of the statute. [SOLOMON, J., pointed out that, under Act 27 of 1883, § 14, all candidates were now required to pass the University examination, and *Van Zyl's* case appeared to be on the same footing as the present.]

*Solomon* replied.

*Cur. adv. vult.*

*Postea* (September 5),—

LAURENCE, J.P., said:—This was an application for an order of the Court to allow the petitioner, who was articled to an attorney of this Court in July, 1888, to count his

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period of service, as clerk to a judge, from October, 1880, to March, 1883, as a portion of the period of such service required by law prior to his admission as an attorney. The application was opposed on behalf of the Incorporated Law Society, on the ground that the service had not been continuous or for "three consecutive years," as required by Act 12 of 1858, Section 3. As I said when we reserved judgment the Court is always glad in a case of this kind to have the views of the Law Society represented to it, and the Society in my opinion is discharging one of its most useful functions in subjecting applications of this kind to a careful scrutiny. It was admitted on behalf of the petitioner that his object was, if this application was acceded to, to at once apply for an order for his examination under Rule of Court 293, made applicable to this Court by Rule 362, as to his qualifications for admission forthwith. Now as to the reasons for the breach of continuity in service, to which the Law Society objects, and which are fully set forth in the petition, it is unnecessary to recount the facts in detail. It is sufficient to observe that while on the one hand the employment by the petitioner of the time which has elapsed appears to have been entirely creditable, on the other hand, it does not appear that he ever formed the intention of becoming an attorney, or directed his studies to that end, until he became articled to Mr. Fitzpatrick rather more than a year ago. Now the case is one in which, in view on the one hand of the precedents which have been cited in the petitioner's favour, and on the other of the grounds of objection which have been very properly brought to our notice, we have felt considerable difficulty as to our decision; and I therefore think it is desirable to trace, as briefly as possible, the history of the law and practice in these matters. In the first place, it was provided by Rule of Court 149, promulgated, under the power contained in Section 20 of the Charter of Justice, in September 1829, that any person who had served an attorney of the court as his clerk for five years continuously should be eligible for admission as an attorney; and Rule 152 of the same date provided that any period not exceeding four years out of the five years' service then required might be served as clerk

to a judge. No examination was then required. Then we come to Section 3 of Act 12 of 1858, which provided that persons who had obtained certain certificates in law and jurisprudence, to which I shall have presently more particularly to refer, and who had served as attorney's clerks "throughout the term of three consecutive years," should be entitled to admission after three in lieu of five years' service. The passing of this certificate examination was thus optional, but those who passed it saved two years by doing so. I must next refer to the recent decision of the Supreme Court in the case of *Kotze*, where it was held that the benefit of this provision of the Act of 1858 extended to those who had served part of their time as judges' clerks, so that apparently instead of not more than four years out of five being servable with a judge, not more than two out of three so served, coupled with the obtaining of a certificate, would be sufficient, in the case of consecutive service, to qualify for admission. According to the report in the *Cape Times* of August 13, it seems that, if the matter had been one of first impression, the CHIEF JUSTICE in *Kotze's* case would have been disposed to uphold the contention of the Law Society, that the Act of 1858 did not apply to judges' clerks, and that they must therefore still serve the full five years under the Rule of Court; but, as in other cases similar applications had been previously granted, the Court did not think it right, in fairness to the applicant, to construe the requirements of the law more strictly in the case then before it. In the present case, however, a distinction has been drawn, in that Mr. Irving's service with the judge has not been continuous with, and indeed is separated by an interval of more than five years from, his present articles. Looking at the wording of the section, this objection would certainly seem to be fatal, were it not for the precedents quoted on behalf of the applicant, namely, the cases of *Lance*, *Johnson*, *Smith* and *Van Zyl*. Now I have been authoritatively informed that these decisions were based on certain previous unreported decisions of the Supreme Court, and it is also to be observed that they all appear to have been pronounced on *ex parte* applications, so that the attention of the Court was not expressly directed

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to any legal objections which might exist to the orders being made. Still, however that may be, they are decisions of the Supreme Court, which, even if we may feel some difficulty in reconciling them with the strict letter of the law, we must regard as precedents for our guidance *in pari materia*. Moreover, I do not understand it to be urged on behalf of the Law Society that, if the Court is entitled to exercise any discretion at all in these matters, the present is not a proper case to exercise such discretion in the petitioner's favour. The point, however, has been taken that these were cases under the Rule of Court, which speaks of "continuous employment," while the present is an application under the Act, which uses the expression "three consecutive years," which is alleged to be a stronger expression; and it might also possibly have been suggested that it is easier for the Judges to shew some liberality in construing one of their own rules than in dealing with an express legislative enactment. It appears to me, however, that the difference in phrase implies no real difference of meaning; if service is continuous it must also extend over a consecutive period of time, and service for consecutive years is practically the same as continuous employment. Moreover, it is to be observed that at all events in the most recent case, that of *Van Zyl*, the facts and dates shew that the application must have been made under the Act. For it was made in 1888, after the examination, by Act 27 of 1883, Section 14, to be hereafter referred to, had been made compulsory. The service which leave was granted to count amounted to only nine months; so there would have been no object in making the application under Rule of Court 149, in which case four years and three months would still have remained to be served, whereas the applicant after three years' service, and passing an examination no longer optional, would have in any event been entitled to admission. It only remains, on this branch of the question, for me to notice a local Ordinance on the subject—Ord. 10 of 1879, G.W., which was not referred to during the argument, but which I came across while considering the state of the law, and which at first sight appeared to create a serious difficulty. By Sect. 2 of this Ordinance, applying the



provisions of Act 12 of 1858 *mutatis mutandis* to the Province of Griqualand West, it is provided *inter alia* "that persons who may have at any time served, under articles, to any attorney of the Supreme Court or Court of the Eastern Districts of the Colony of the Cape of Good Hope, for any less period than that required by law, shall, on serving continuously for the residue of the period so required, under articles, to any attorney of the High Court of Griqualand, be entitled to admission as attorneys of the High Court of Griqualand, as if they had served the whole period so required in the said Province; provided always that such mixed service shall be as far as possible continuous, and that there shall not, in any case, have elapsed a period of more than twelve months between the end of one portion and the commencement of the other." This last proviso of the Ordinance, which is printed in the official edition as still unrepealed, at first sight appeared to present a fatal obstacle to the present application; but on referring to the provisions of the Griqualand West Annexation Act, 39 of 1877, section 21, I find it enacted that "service rendered under articles by any clerk to any attorney of either of the said courts"—that is, the Supreme Court, the Eastern Districts Court, or the High Court—"before such annexation shall, for the purpose of entitling the articulated clerk so serving to be admitted and enrolled as an attorney of either or both of the other said courts, be reckoned as if the attorney to whom such service was rendered had been, when the articles were executed, an attorney of such Court." I presume that this enactment may fairly be held to cover by implication the case of Judges' clerks, and that its effect was, on annexation taking place in 1880, to impliedly repeal the special proviso of the local Ordinance of 1879 cited above, the intention evidently being to assimilate in all respects the position, rights and status of practitioners in Griqualand West to their position in other parts of the Colony. In any event, the Law Society has not based its opposition on the terms of this local Ordinance. On these grounds I arrive, though not without some hesitation, at the conclusion that it is within our competence to grant this application; but the question

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remains whether sufficient cause has been shewn for the exercise of our discretion in the applicant's favour and to the full extent applied for, of course giving due consideration to the extent to which a similar discretion has been exercised in previous cases. Now from those cases the present appears to differ in at all events one material feature, namely, that apparently it was not till he executed his present articles that the petitioner began to prepare himself for the practice of that branch of the profession to which he now desires to be admitted; neither when he became a Judge's clerk several years ago, nor during the interval which has since occurred, does it appear that he had any such purpose in contemplation. In these circumstances we are inclined to think that one year's service under articles can scarcely be regarded, in the present state of the law, as affording an adequate period of preparation; and we think that the order should only be granted conditionally on the applicant serving Mr. Fitzpatrick for a period of not less than two years from the date of his articles, *i.e.*, till July next. I may add that another reason which has induced us to fix this period is based on the circumstance that it is, to say the least, very doubtful whether in any event he could be admitted before next July, and if that be so it is obvious that we are granting all that can be asked of us. I say that this is doubtful, because it is admitted that the petitioner, although he has taken the LL.B. degree, has not obtained the University certificate in law and jurisprudence, and if the production of this certificate is a condition precedent to his admission he could not obtain it before the next University Examination in June or July of next year. Whether this certificate is necessary or not has not been argued, but since the argument, the point having been mentioned in Court, the petitioner has caused to be forwarded to me a letter from the Secretary of the Law Society, dated July, 1888, intimating that the LL.B. certificate will be sufficient to meet the requirements of Sect. 14 of Act 27 of 1883. Whether, however, this certificate will be sufficient for his purpose is a matter which not the Law Society but the Court will have to decide; and it appears to me that in order to

do so we shall have to solve one of those conundrums with which the Legislature, in this as in other countries, has a playful habit of endeavouring from time to time to puzzle the Courts. It may be observed in the first place that Act 12, 1858, section 3, refers to "either of the certificates in law and jurisprudence" mentioned in section 16 of Act 4 of the same year. Now this Section provides that "There shall be two classes of such certificates of proficiency in law and jurisprudence, a higher and a lower; and the acquirements demanded for the attainment of the higher of these certificates shall include all the acquirements demanded for the attainment of the lower of them, with such additions as to the Board shall seem fit." Now in place of the certificates of the Board of Examiners constituted under this Act have been substituted those granted by the Cape University, incorporated under Act 16 of 1873, the LL.B. examination, as I apprehend, being understood to represent the former examination for the higher and the examination for the certificate of proficiency in law and jurisprudence the former examination for the lower such certificate. Notwithstanding, however, the provisions of Act 4, 1858, section 16, quoted above, I think it will be found, as a matter of fact, on reference to the University Regulations, that the LL.B. examination does not include certain acquirements, such as notarial practice, which are included in the certificate examination and the acquisition of which is very important in the case of attorneys. Moreover, sections 20 and 21 of the University Act clearly provide that, while the LL.B. degree shall qualify for admission as an advocate, the certificate mentioned in the preceding section 19 shall, for the purposes of section 3 of Act 12 of 1858, place candidates in the same position "as if they had obtained one or other of the certificates in law and jurisprudence" described therein—that is to say the certificates under section 16 of Act 4 of 1858. So far it would seem clear that the certificate is required; but a doubt certainly is produced by the reference in Act 27 of 1883, section 14, to the production by the applicant "of a certificate of having passed one of the examinations in law and jurisprudence referred to in section 3 of Act 12 of 1858." Whether the Law Society is right in

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the view which it appears to entertain of the effect of this section, and whether it is to be regarded as repealing or modifying section 21 of Act 16 of 1873, as I have said, appears to be open to doubt and the Court of course would not decide the point unless it became necessary to do so and after hearing it argued. I merely mention the matter now as affording one of the reasons for our proposed order and also in order that the applicant, should the Court ultimately hold the certificate indispensable, may not be taken by surprise or lose a year through relying on the dictum of the Law Society. Our view on the whole case is that, while if the certificate is required we are granting all that can be given, even if it is not, it is not too much in all the circumstances to require the applicant to serve his present articles for two years. It may have been noticed that I said something just now as to the present state of the law; and I will only add that if, as I have reason to believe probable, some amendment of the law in this respect is proposed, in my opinion it is deserving of consideration whether some special provision might not properly be made, as has been made recently, I believe, by the Benchers of the English Inns of Court, in favour of persons similarly situated to the present petitioner. During my experience on the Bench here I have known of at least three cases in which advocates have left the bar with a view to becoming attorneys; and it certainly seems a fair question whether some special facilities in such cases might not fairly be afforded for the desired migration to what have been described as the "inferior" but what, judging from such cases, also appear to be the more remunerative, "walks of the profession." This, however, is a matter beyond our province and I simply take this opportunity of directing attention to it. The order of the Court will be that the application be granted, subject to the condition that the petitioner do serve his present articles for not less than two years continuously and fulfil all the other requirements of the law prior to applying for admission as an attorney of this Court. I may add that this judgment has been written since my brother SOLOMON left Kimberley on leave of absence, but the matter was fully discussed with him before he left and he entirely agrees in the order which has

been made. As to costs, I hope the Law Society will not think it necessary, in all the circumstances, to apply for them; but if they do I think we ought to direct that their costs be paid by the petitioner.

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COLE, J., concurred.

Guerin said that he had not been instructed to apply for costs.

[Petitioner's Attorneys, PLAYFORD & FITZPATRICK.  
Attorney for the Law Society, D. J. HAARHOFF.]

### DIXON vs. REID AND JOHNSTON.

*Practice.—Pleading.—Exception.—Promissory note.—Agent.  
—Partnership.*

*D. sued R. and J. on certain promissory notes which had been made in D.'s favour by R. in his personal capacity and also as agent for J. R. confessed judgment, but J. pleaded that the only moneys if any he owed D. arose from expenses incurred in a certain mining venture, in which D., J., and R. had been jointly interested, and that R. had held the general power of both D. and J. at the time of the said venture and when the notes were made, but that the said power had been subsequently revoked. He admitted that D. had made disbursements on account of the said venture, but pleaded that he had been unable to obtain any account thereof, and was therefore unable to tender his pro rata share. In reconvention he repeated that such disbursements had been made by D., and alleged that expenses had been incurred and profits realised, while R. was carrying on the work on behalf of all parties, and claimed an account of disbursements and receipts. D. excepted to the portion of the plea, of which the substance is above set forth, as vague, embarrassing, and irrelevant, and also to the counterclaim as not disclosing any cause*

*of action. The Court overruled the exception to the counterclaim but, while holding that the objection to the plea, as applying only to certain portions thereof, should as a matter of practice have been taken by way of motion to strike them out, sustained the objection in substance on the grounds alleged.*

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This was an action on three promissory notes, amounting together to £3914 11s. 5d., and alleged to have been made by the defendants jointly and severally in favour of the plaintiff, to have become due and payable on Dec. 31, 1883, to have been duly presented and dishonoured and to still remain unpaid. The plaintiff claimed the amount of the said notes, with interest and costs. The defendant Reid confessed judgment. The plea of the defendant Johnston, after admitting in the first paragraph the presentation, dishonour and non-payment of the notes, proceeded as follows:—

2. The said defendant says that the only moneys if any which he owes to the plaintiff arise from expenses incurred in a certain venture in and about working a certain diamond mine at Kamfersdam, in which venture the plaintiff and the two defendants were jointly and equally interested, between the 1st day of March, 1883, and the 31st day of August, 1883.

3. At the time when the said joint venture was proceeding the defendant Reid held the general power of attorney of the plaintiff and had received moneys for speculation and investment from the plaintiff, and he likewise at that time held the general power of attorney of the defendant Johnston.

4. The moneys expended upon the said joint venture were provided by the said Reid from the moneys forwarded to him by the plaintiff, but the defendant Johnston denies that the promissory notes now sued upon were given for his share of the said expenses, and he further says that he has at all times been willing and professed his willingness and hereby again professes his willingness and tenders to pay his *pro rata* share of the said expenses upon receiving an account of the same from the said plaintiff or from the said Reid on behalf of the said plaintiff.

5. No account of the said expenses has ever been furnished to the said defendant and the defendant is therefore unable to tender any definite amount.

6. The defendant Johnston has had no consideration for the promissory notes now sued upon, and the said notes were made by the said Reid not in acknowledgment of any liabilities of the defendant Johnston to the plaintiff, but on some other account of which the said defendant is in ignorance and on which the said Reid had no authority to bind the said



defendant, and the existence of the said alleged liabilities and of the said promissory notes was not revealed to the said defendant until about the 10th day of October, 1888.

7. The defendant Johnston revoked his power of attorney in favour of the said Reid on or about the 13th day of August, 1887.

8. The defendant Johnston prays for judgment with costs.

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### CLAIM IN RECONVENTION.

1. For a claim in reconvention the defendant Johnston says that between the 1st day of March, 1883, and the 31st day of August, 1883, the said defendant together with the defendant Reid and the plaintiff were jointly and equally interested in a certain mining venture in a diamond mine at Kamfersdam in the district of Kimberley.

2. The work at the said mine was carried on by the said Reid with the money supplied by the said plaintiff, and the said Reid was the general agent of the plaintiff and of the said defendant.

3. In the course of the said works, diamonds of considerable value were won and realized on behalf of the venture, and large expenses were incurred.

4. The defendant Johnston, though he has frequently demanded from the plaintiff and from the said Reid on behalf of the plaintiff an account of the said expenditure and receipts, has hitherto been refused a statement.

5. The defendant claims in reconvention

- (i.) An account shewing the disbursements and receipts in the said mining venture.
- (ii.) General relief.
- (iii.) Costs of suit.

The plaintiff thereupon filed the following "exception to pleas and claim in reconvention"—

1. The plaintiff excepts to the 2nd, 3rd, 4th, 5th and 7th paragraphs of the pleas as being vague, embarrassing and irrelevant, and prays that they may be struck out.

2. The plaintiff excepts to the claim in reconvention on the grounds that the facts therein stated disclose no cause of action against the plaintiff for the account prayed for in the said claim.

Wherefore the plaintiff prays that the said claim may be dismissed with costs.

The case now came on for argument on exception.

*Solomon* argued for the plaintiff. [LAURENCE, J.P., observed that in this case the objection taken in the case of *Rauloss vs. Radjif* (see *supra*, p. 102) might be urged with more force, namely that, as only certain portions of the plea were

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impugned as "vague, embarrassing and irrelevant," an application should have been made on motion to strike them out on that ground. It was not competent to except to certain paragraphs only unless they clearly set up a separate ground of defence; *Adamanta D. M. Co. vs. Smythe*, 1 H. C. 116.] The course suggested would have been adopted but for the exception to the counterclaim, it being thought more convenient to combine the objections to both plea and counterclaim. As to the latter, it did not appear whether the claim for an account was against the plaintiff as a partner or as Reid's principal, but in neither case was any cause of action disclosed, as it was not alleged that the plaintiff had any share in the management of the venture: *Voet*, 17. 2. 11. This had been left by both parties to Reid and, he having been their common agent, one could not make the other responsible for his default. Then as to the pleas, paragraph 6 denied consideration or authority and might afford a substantial defence; but what was the relevancy of the other paragraphs, *e.g.* of paragraph 7? They were all vague, embarrassing and *ex facie* irrelevant, and it was impossible for the plaintiff to reply to them.

*Hopley, C.P.* (with him *Joubert*), *contra*, submitted that in the special circumstances the defendant was entitled to inform the Court of the special relationship existing between the parties. [LAURENCE, J.P.:—But this is an action not on a partnership but on certain liquid documents. If the plaintiff had sued provisionally, would it have been any defence to put on affidavit such matter as is here pleaded? ] The defendant's case was that the plaintiff was not an independent holder for value but a partner. The notes had been signed, not by the defendant personally, but by Reid acting under his power, and in such a case the agent of both parties, making notes on behalf of one in favour of the other, could not properly discharge the duties of his fiduciary position; *Story on Agency*, § 31, §§ 210–214. As to the exception to the counterclaim, it was a matter not for exception but for a plea. The defendant had a right to claim an account and if the plaintiff was not in a position to render one he could so allege.

*Solomon* was heard in reply only as to the counterclaim.

LAURENCE, J.P.:—I think the objection to certain portions of the plea, regarded as an application to strike them out on the grounds alleged, must clearly succeed. On the face of it, it is no answer to an action on bills to say that the only money the defendant owes to the plaintiff arises from a mining venture. As to paragraph 6, no objection has been taken to it; but unless it is intended to set up that these were accommodation bills and that the plaintiff gave no value for them, or that they were made and received fraudulently, it would seem very doubtful whether the mere allegation that Reid, who admittedly held the defendant's general power, exceeded his authority in making them, would in itself constitute any valid defence to the present claim, whatever remedy Johnston might have against Reid. However, that point is not at present before us and it is sufficient to say that the objection taken to the other paragraphs must be sustained. As to paragraph 2, it appears on the face of it to be embarrassing and irrelevant. The allegation in paragraph 3 that Reid held the powers of both parties might possibly in connection with other facts be material—if for instance paragraph 6 were expanded and it was connected therewith. But the bare allegation as it at present stands is *primâ facie* irrelevant and I merely mention the matter in order that it may be understood that, if the defendant pleads again, he might be at liberty in certain contingencies to refer to and rely on some of the matters mentioned in this paragraph. Then as to paragraphs 4 and 5, it is sufficient to observe that there is no allegation in the declaration that the bills were given on the account referred to and no demand for such a payment as the defendant professes his inability to tender; all that need be said about these paragraphs therefore is that they appear to be an answer to a claim which has never been set up. Lastly, as to paragraph 7, no serious attempt has been made to defend it; on the face of it, it refers to a matter which would not be evidence and even if it were it would be pleading evidence. With regard to the exception to the counterclaim, there may be some room for doubt; but on the whole I do not think any harm will be done by allowing that to stand, especially as it alleges that the plaintiff made

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disbursements on account of the venture in question and that certain expenses were incurred and profits realised. It may certainly be arguable whether the mere making of disbursements by the plaintiff, without any distinct allegation that he received any of the proceeds, can impose on him the duty of rendering an account or bring him within the expressions of *Voet*, already cited, *ut socius reddat rationes administrationis, si quid societatis intuitu ab eo gestum sit, aut geri debuerit*. But if he has done nothing on account of the partnership, and was not under any obligation to do anything, at all events he will have no difficulty in pleading to that effect. The Court will therefore direct the paragraphs of the plea objected to to be struck out, with costs, and will give leave to plead again. The exception to the counterclaim will be overruled but as the costs have not been increased by its being taken it will not affect the order in that respect.

SOLOMON and COLE, JJ., concurred.

[Plaintiff's Attorneys, CALDECOTT & BELL.  
Defendants' Attorneys, COGHILAN & COGHILAN.]

ROTHIMAN vs. DU PREEZ AND OTHERS.

*Village Management Board.—Quo warranto.—Election.—Returning Officer.—Relator.—Estoppel.—Acquiescence.—Acts 29, 1881, 28, 1882, 7, 1884.*

*At an election of a Village Management Board, no voters' list had been prepared by the Magistrate in the manner prescribed by law, but a list was used which contained the names of all persons legally qualified to vote. This list had been prepared by R., who was an unsuccessful candidate at the election, and who thereupon applied to the Court to set it aside, on the grounds inter alia of the absence of a proper voters' list, and also that the chairman of the meeting and returning officer, D., had himself been*

*nominated and elected as one of the members of the board. It appeared that D. was the only person qualified, as a Justice of the Peace, to preside at the meeting, and that, on this as on previous occasions, he had done so and been a candidate without any objection being taken. The votes had been checked by scrutineers appointed by the meeting and R. had admitted the correctness of the result. The Court refused to set aside the election.*

This was an application to set aside the election of the respondents, Messrs. Du Preez, Dundas and Faul, as members of the Board of Management of the Village of Warrenton. Numerous affidavits were filed on both sides, and the application was based on several grounds, to some of which it is unnecessary to refer, as they were not relied upon in argument. The notice of motion called upon the respondents to shew cause why their election should not be set aside and a fresh election ordered, and an interdict granted against their performing the duties of a Management Board, and also why they should not be ordered to pay the costs *de bonis propriis*. The motion was supported by the petition of C. F. Rothman, who alleged that he was a resident and ratepayer of Warrenton, in the division of Kimberley, which was proclaimed a village, in terms of Act 29 of 1881, by a proclamation of May, 1884. The petitioner was a member of the Village Management Board for the year ending July 31, 1889. He annexed a copy of the notice inserted in the local papers in June, 1889, by the Resident Magistrate of Kimberley, in terms of Act 29, 1881, § 4, convening a meeting of voters at Warrenton for July 3, for the election of a Board of Management for the ensuing year, commencing on August 1. At the said meeting, in the absence of the Magistrate, the respondent Du Preez, who was a ratepayer and Justice of the Peace residing at Warrenton, took the chair. The petitioner then handed Du Preez a letter which he had written about a week previously to the Magistrate of Kimberley, asking that one Adams and one Burgers, residents at Warrenton, should be placed on the list of voters, which letter the Magistrate had returned with his approval of the request endorsed thereon. These

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names were accordingly added and also, on the suggestion of Du Preez, that of one Schalk Vorster, to whom, however, the petitioner objected on the ground that he was not a resident within the village. Thereafter certain proceedings, immaterial for the purposes of this report, took place, and the said S. Vorster then proposed Du Preez and Dundas as candidates, Faul, the petitioner, and one Adams being also proposed by other persons. Three members having to be elected, a ballot took place, and the chairman, after examining the voting papers, declared the respondents elected, the petitioner being fourth on the poll. The petitioner from subsequent inquiries had ascertained that no voters' list had been made out by the Magistrate, in terms of sect. 4 of Act 29 of 1881, and consequently the chairman had no such list to guide him at the said election. The respondents were now carrying on the business of the Board of Management, and the petitioner objected to their election on the grounds *inter alia* that no voters' list had been framed as required by law, that the said S. Vorster, who nominated and voted for two of the respondents, was not a resident within the village, nor entitled to be on the voters' list, and that the respondent Du Preez, by presiding at the meeting and conducting the business, was disqualified from being a candidate. In reply to these statements, the respondent Du Preez explained that he took the chair at the meeting, in the Magistrate's absence, as being the only Justice of the Peace present. A list, which he annexed to his affidavit, was handed to him by the petitioner as containing the names of all persons entitled to vote at the election, and some discussion then took place as to the addition to the list of the names of Messrs. Adams and Vorster, the latter being, as the deponent asserted, a registered voter within the ward and a resident within the village. In the end it was agreed that both these names should be added to the list, and the election was proceeded with, but the respondents Du Preez and Dundas were not proposed by Vorster as alleged, but were proposed by one Tren and seconded by one G. Gauche. All the voters whose names appeared on the aforesaid list, with the exception of the deponent's brother, who was absent, then proceeded to vote,

and the voting papers were submitted to two scrutineers appointed by the meeting. The petitioner was present when the scrutineers called over the votes and checked the same, and admitted the correctness of the result, which was as follows:—For Du Preez, 17 votes ; for Dundas and Faul, 14 each ; for Rothman, 11 ; and a less number of votes for each of three other candidates. No objection was taken and the respondents were therefore declared duly elected. Corroborating affidavits were also filed by the other respondents, and also by the Field Cornet of the Ward, Mr. Moir, who was present at the election and acted as one of the scrutineers, and who added that the list which was used contained the names of all the registered voters entitled to vote at the election, and that all the persons on the list, with the exception of Adams, were resident in the village and entitled to vote. The Magistrate, Mr. Truter, made an affidavit in which he stated that he had duly framed a voters' list in terms of the Act, after the last list of registered voters had been framed and published, and had forwarded the same to the Village Management Board, and was informed and believed that the same had been used at the election of the Board in 1888. It appeared, however, from an affidavit of Mr. Judge, the Civil Commissioner, that he had framed a list of parliamentary voters for the division of Kimberley early in 1887, and in accordance with the provisions of Act 14 of 1887 had subsequently made out a fresh list, which was completed on May 23, 1888, and then at once forwarded to Cape Town to be printed. Mr. Truter then made a further affidavit, stating that he could not remember at what date or from what parliamentary voters' list he made out the list referred to in his previous affidavit, but as he left his office on sick leave on May 25, 1888, it could not have been from the list completed by the Civil Commissioner on May 23, but must have been compiled from some other previous list of parliamentary voters. There was also a replying affidavit by the petitioner, in which he stated that he had made out the list used at the election a few days before, as a rough list of all persons whom he thought entitled to vote, and for his own guidance in canvassing, and the list happened to be lying on his office

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table when the election took place, the meeting being held in his office. He also repeated that the residence of Mr. S. Vorster lay beyond the boundaries of the village, as defined by Proclamation, and that the election of the respondents had been proposed by Vorster, as previously alleged, but added that he believed that afterwards, on account of the objection taken, the Chairman had caused Vorster's name to be erased and another substituted as proposer. As to Mr. Truter's affidavit, the petitioner alleged that he had been Secretary of the Village Board from some time in 1886 to August, 1888, and from that date had been Chairman, and he denied that any such list as mentioned by the Magistrate had ever been seen or received by himself as Secretary or Chairman, and added that he had been informed and believed that there was no record in the Magistrate's office of any such list having been prepared or sent to Warrenton as alleged by Mr. Truter. He further stated that in July 1888, as Secretary of the Board, he wrote to the Acting Magistrate, Mr. Graham, pointing out that no list of voters had been made out as required by the Act, and asking him to make out and send such a list, in reply to which Mr. Graham sent a list of all the voters resident within the Ward, which had been made out by Mr. Moir, the Field Cornet, for Parliamentary purposes, under Act 14 of 1887. This list, however, contained about 193 names, of whom only from 25 to 30 were resident within the village. Next came an affidavit by Mr. H. Jones, who had been appointed Secretary of the Village Board in October, 1888, and who corroborated the allegations of the petitioner and annexed the original pencil minutes of the meeting, from which it appeared that Mr. S. Vorster's name had originally been written as the proposer of Messrs. Du Preez and Dundas, but this had subsequently been erased at the suggestion, as the deponent stated, of Mr. Du Preez, and the names of Messrs. Treu and G. Gauche, as proposer and seconder, written above. Affidavits by seven other persons present at the meeting, and who corroborated the statements made by Mr. Rothman in his petition and affidavits, were also filed. In further reply, Mr. S. Vorster made an affidavit, in which he stated that he was now residing and carrying on business

within the village, and he attached his receipts for rates, &c. He also stated that he had withdrawn his nomination of the respondents as candidates at the meeting, and they had then been nominated by Tren. There was also an affidavit by Mr. J. H. Gauche, who, together with Mr. Moir, had been unanimously appointed a scrutineer, and who described the manner of voting, the result of which had been checked and admitted to be correct by the petitioner, and he also annexed the original voting list made out by the scrutineers, shewing the result to have been as stated by Du Preez. Lastly, the respondent Du Preez, in a further affidavit, stated that he had been in the habit, in his capacity as a Justice of the Peace, of presiding at these election meetings at Warrenton, and had done so for some years, and when he had been himself a candidate, and on one of these occasions he had been rejected and Mr. Rothman elected and no objection had ever been raised to his presiding at such meetings. He also produced a fair copy of the minutes of the last meeting, written in ink by the secretary, Mr. Jones, in which the names of Messrs. Tren and G. Gauche appeared as proposing and seconding the respondents as above set forth, and these minutes he again affirmed to be true and correct in every particular.

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*Solomon*, for the petitioner, referred first to the absence of a voters' list and commented on the affidavits made by the Magistrate. It was clear at all events that no list had been made from the latest parliamentary voters' list, as expressly required by Act 29, 1881, § 4. He also referred to sections 5 and 7, and Act 7, 1884, § 4, and contended that the effect of these sections was to make the framing of such a list a condition precedent to the election and its absence a fatal omission. The respondents might suggest that the applicant had waived the irregularity and was in the position of participating relators; this, however, was not a mere irregularity but an illegality going to the root of the whole proceedings. He referred to *Brice on Ultra Vires*, 2nd Ed. 647-650, 755; *R. vs. Smith*, 3 T. R. 573; *Fisher's Digest*, iv. 7341, s. v. "*quo warranto*, acquiescence," and cases there cited. Then, as to the second objection, the affidavits



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shewed that S. Vorster was not a registered voter and therefore not qualified under § 7 of the Act; wherever he resided he could not have been on the list had it existed; *R. vs. Parkinson*, L. R. 3 Q. B. 11. There was a conflict of evidence as to the facts, but the balance was strongly in favour of his having been the proposer of these candidates. [The COURT intimated that, if the case were to turn on this point, it could scarcely be decided on the affidavits.] The last objection was that Du Preez was disqualified from being a candidate by taking the chair and acting as returning officer. As such he was a judicial officer and could not return himself; *Cullen vs. Morris*, 2 Stark, 587, and 1 Sm. L. C. 8th Ed. 322; *Bottomley vs. Sim*, 1 H. C. 167, per JONES, J., at p. 183 and LAURENCE, J., at p. 198; *R. vs. Owens*, 28 L. J. Q. B. 316; *R. vs. Backhouse*, 36 L. J. Q. B. 7. What might have taken place at previous elections was immaterial on this point.

*Hopley, C.P.*, for the respondents, contended that the applicant had no *locus standi* to take these objections. It appeared that with reference to the list there had been some irregularity on the part of the Magistrate, but the question was whether the village was to be deprived of its representation and management on that ground. Mr. Truter's affidavit shewed that a list had been framed at some period and that must hold good till a new voters' roll was prepared, otherwise no board could be elected. Mr. Graham had sent in July 1888 a list of the registered voters in the ward, and apparently this must have been used at the election in that year. The Magistrate could have gone down and framed a list on the spot, and so could the Chairman under Act 28, 1882, § 2. [The COURT held that the "powers" mentioned in this section clearly did not extend to the framing of a voters' list.] In any case, it appeared that all who were qualified to be on the list were present and voted, except Du Preez's brother who was absent, and that, with two possible exceptions which did not affect the result, none took part in the election who were not so qualified. The applicant, moreover, was estopped by his conduct. He had himself committed every irregularity of which he complained and as the previous Secretary and Chairman was himself



responsible for there being no list. The Court would not lightly interfere with the existence of a corporation: *R. vs. Bond*, 2 T. R. 767; *R. vs. Parry*, 6 A. & E. 810; *R. vs. Greene*, 2 Q. B. 460. [LAURENCE, J.P., referred to *Palmer and another vs. Kimberley Town Council*, 1 A. C. 227, and cases there cited.] In the present case the applicant concurred or acquiesced in the irregularity complained of: *R. vs. Trevenen*, 2 B. & A. 339; *R. vs. Slythe*, 6 B. & C. 240; *R. vs. Lofthouse and Wilson*, L. R. 1 Q. B. 433, per Mellor, J., at p. 441, quoting *Corner's Crown Practice*, 184; *R. vs. Ward*, L. R. 8 Q. B. 210. As to the third point, the same argument applied. Moreover, Du Preez, as the only Justice of the Peace present, had no option as to presiding and no objection had been taken to his doing so.

*Solomon*, in reply:—The petitioner never acquiesced in the nomination of Du Preez after he had been appointed Chairman. As Chairman, he exercised judicial functions, *e.g.*, in deciding the point as to Vorster's eligibility. Then as to the voters' list, the law was imperative and not directory. In the absence of such list there could be no valid election, and if the election was absolutely void *ab initio* the Court would set it aside no matter who was the relator. [SOLOMON, J., referred to *Daniel vs. Daniel*, 3 Juta, 231.]

*Cur. adv. vult.*

*Postea* (Sept. 2),—

LAURENCE, J.P., said:—In this matter a judgment was prepared, after consultation, by Mr. Justice SOLOMON, who has since left Kimberley. I have read it, and concurred with it generally, and with his assent have added some further observations, so that it may be taken as the judgment of the Court. I shall now proceed to read it:—

This is an application to the Court to set aside the election of the respondents as members of the Village Management Board of Warrenton, which election took place on the 3rd day of July, 1889. The petition upon which the application is based sets forth various grounds of complaint, but at the hearing the counsel for the applicant based his

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case upon three grounds only and abandoned the remainder, so that it is not necessary now to say anything upon these points which were abandoned. The three points relied upon by the applicant's counsel are the following:—1. That at the time of the election no list of voters resident within the limits of the village had been framed by the Resident Magistrate, as required by the Village Management Act of 1881. 2. That Du Preez and Dundas, two of the respondents, were nominated as candidates by one Schalk Vorster, who was not a person duly qualified to nominate candidates under the provisions of the aforesaid Act. 3. That the respondent Du Preez, who took the chair at the meeting when the election took place, and who was the returning officer at the election, was himself one of the candidates, and that his election consequently is void. As regards the second of these grounds, it is sufficient at present to say that the evidence upon this point—both as to whether Mr. S. Vorster did or did not propose the candidates, and as to whether he was or was not a resident within the village—is so conflicting that as intimated during the argument it would be impossible for the Court, upon affidavits, to decide that the facts relied upon by the applicant have been established, and consequently it is unnecessary to say anything further upon this portion of the case. Proceeding then to the first ground of complaint, it seems clear that at the time of the election no such list of registered voters as is required by Act 27 of 1881 had been framed by the Resident Magistrate of Kimberley for the purposes of this election. Sect. 4 of that Act requires that as soon as any village shall have been proclaimed under the Act, the Resident Magistrate of the Division shall, from the list of registered voters of the Division, frame a list of all such voters as shall be resident within the limits of the village, and shall thereafter, as often as any fresh registration of voters shall take place, frame from the new list of such voters a revised list of such voters as are resident as aforesaid. Now, the village of Warrenton was proclaimed under the Act on the 6th of May, 1884. It seems doubtful whether thereafter the Resident Magistrate of Kimberley did at any time frame a list of the voters resident within the village. The Resident Magis-

trate's own recollection is that he did frame such a list; but on the other hand it is admitted that there is no record in his office of any such list, no such list has been produced or appears to be in existence, and the applicant himself says that, though he was Secretary of the Board from some time in 1886 to August, 1888, and Chairman from August, 1888, up to the election in July, 1889, no such list was ever received or seen by him. But whatever doubt there may be on this point, this much is clear, that, after the last registration of voters, which was completed on the 23rd May, 1888, no new list of voters was framed by the Resident Magistrate as required by the 4th section of Act 29 of 1881. The most that was done was that the Acting Resident Magistrate sent to the Secretary of the Board a voters' list of all the voters resident in Ward No. 2, in which Ward the Village of Warrenton is situate. This list, however, contained a large number of names of voters not resident within the village, the total number of voters in Ward No. 2 being about 193, whereas there are only from 25 to 30 voters resident within the village. It seems to me that it is impossible to hold that this was a compliance with the provisions of sect. 4 of Act 29 of 1881, and consequently I think it is established that no such voters' list as is required by that Act was framed by the Resident Magistrate of Kimberley. On the other hand it is clear that at the election a list was used, framed by the applicant himself, containing the names of all the registered voters resident within the village as well as of three other persons—Messrs. Adams, Burgers and S. Vorster—two of whom were placed upon the list at the applicant's request and with the approval of the Resident Magistrate, and the third of whom was placed upon the list by the respondent Du Preez. Consequently all the persons who would have been entitled to vote if the Resident Magistrate had framed a proper list had an opportunity of voting, and they all exercised their right with the exception of one person who was absent from the village. It is true that three other persons also voted, but the list of votes given for the different candidates, when examined in detail, shews that the ultimate result of the election was not affected by their votes. Notwithstanding

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this fact, however, the objection which has been taken to the voters' list is of so serious a nature that it might possibly have been held to be fatal, unless some of the preliminary and personal objections taken by the respondents could be sustained. But before considering these objections, let me proceed to refer to the third ground relied upon by the applicant. It is clear from the affidavits that the respondent Du Preez, who was one of the candidates, acted as Chairman at the meeting and as returning officer. Moreover, the authorities quoted at the bar on behalf of the applicant, and others, which were fully discussed in this Court in the case of *Bottomley and another vs. Sim and others*, 1 H. C. 167, appear to establish that a returning officer is to some extent a judicial as well as a ministerial officer, and that, on the principle that no man can be a judge in his own cause, a returning officer cannot return himself as a member. On the other hand, however, it is to be borne in mind that the position of chairman and returning officer was forced upon Du Preez by the provisions of Acts 29 of 1881, 28 of 1882, and 7 of 1884, inasmuch as he was the only Justice of the Peace present at the meeting. Moreover, he had on several previous occasions when he was a candidate presided at the election, and on none of such occasions had any objection been taken to his doing so, nor was any objection taken at the present election. This objection, however, would undoubtedly also be a serious one, if the only question raised were whether the election was a strictly legal one. This, however, is not the only question, and I proceed now to consider the preliminary and personal objections taken by the respondents to the granting of this application. Now in the first place it is clearly established by the authorities quoted on behalf of the respondents, as well as by many others, that the granting of an application of this nature is a matter purely in the discretion of the Court. As was said by Lord Denman in the well considered and clearly expressed judgment in the case of *R. vs. Parry*, 6 A. & E. 810, "Every case which has turned upon the interest, motives, or conduct of the relator, proceeds upon the principle of the Court's discretion; however clear in point of law the objection may have been to the party's abstract right to



retain his office, yet the Court has again and again refused to look at it or interfere upon one or other of these grounds." It was argued on behalf of the applicant that the Court can exercise its discretion only in cases where there has been some informality in the election, some disregard of provisions which are merely directory; but that where there has been an illegality going to the root of the election and rendering it invalid, the Court is bound to declare such election void. Now I am wholly unable to assent to any such proposition. The only authority in support thereof to which we were referred is the case of *R. vs. Smith*, which is very meagrely reported in 3 T. R. 573, and which in any case does not go so far as the argument advanced by the applicant's counsel. On the other hand, however, there are many authorities distinctly adverse to this contention, such as the case of *R. vs. Parry*, already quoted, *R. vs. Trevenen*, 2 B. & A., 339, and a case in our own Supreme Court not referred to in the argument, *Bottomley vs. Kimberley Mining Board*, 1 Juta, 381, where DE VILLIERS, C.J., said:—"I think there are strong grounds for holding that unless the illegality or informality of the proceedings affected the result of the election, the Court will not set it aside;" and DWYER, J., was of opinion that "the order ought to be refused upon the decisions in English cases, that relators, having taken an active part in an election, would not be afterwards allowed to object to the illegality of the proceedings." That being so, it appears to me that the objections which are urged against the granting of the present application at the suit of the applicant are so strong that the Court, in the exercise of its discretion, ought to refuse to interfere in the matter. In the first place, the affidavits in support of the application do not establish, as was said in *R. vs. Parry*, any corrupt or fraudulent motive for the acts complained of, nor do they shew that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the strict letter of the law. The object of the provisions in the Act as to the framing of the voters' list is simply to provide suitable machinery for the election; such machinery in the present instance was in effect provided by the preparation of a list of the registered

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voters within the village, taken from the list of voters within the Ward, forwarded by the Acting Magistrate, and the result was the same as if the Magistrate had done exactly what the law required. It may, more-over, be added that the decision of BUCHANAN, J., in *Palmer and another vs. Kimberley Town Council*, reported at 1 A. C. 227, so far as it goes is an authority to the effect that, even in the case of an election in a fully organized Municipality, the existence of a proper voters' list is not in all cases absolutely indispensable to the validity of an election. In all such cases, in fact, the policy of the law, as illustrated by many decisions, is so far as possible to give effect to the *bonâ fide* expression of the wishes of the constituent body as to the election of their representatives, *ut res magis valeat quam pereat*. In the second place, the applicant himself concurred in and took part in the present election. He himself framed the list of voters which was used at the election. He knew perfectly well that the list required by law had not been framed by the Resident Magistrate, for he had himself applied to the Acting Resident Magistrate to frame such a list, and he had himself been elected upon previous occasions upon similar informal lists of voters. For these reasons it appears to me that it would be contrary to all equity and propriety to allow the applicant now, merely because he has been unsuccessful at the present election, to succeed in invalidating the whole of the election, and leaving the village without any Management Board. So also in the exercise of our discretion I think that we should refuse to set aside the election of Du Preez on the ground that he acted as Chairman and Returning Officer. The reasons already stated will many of them apply to this part of the application also, and the case of *R. vs. Ward*, 8 Q. B. 210, is, in some of its features, a direct authority in support of the respondent Du Preez. It is not suggested that the mere fact of his being in the chair in any way affected the result of the election; and it can scarcely be supposed that when the Legislature provided by section 2 of Act 28 of 1882 for the chair to be taken at such meetings, in the absence of the Magistrate, by a Justice of the Peace, it could have contemplated or intended in cases like the present, when

there was only one Justice of the Peace in the place, and he was, as appears from the result, the man whom it was considered most desirable to return, that the electors should be disabled from exercising their franchise in his favour owing to his being the only person competent to preside at the meeting. The result is that the application must be refused, with costs.

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[Applicant's Attorneys, CALDECOTT & BELL.  
Respondents' Attorney, D. J. HAARHOFF.]

### COLONIAL GOVERNMENT vs. ROBB.

*Rule of Court 329 (d).—Summons.—Service.—Agent.*

*In an action against R., the summons was served on a clerk of H., who exhibited to the Deputy-Sheriff a general power given by R. to H. H. subsequently stated to the Deputy-Sheriff that he declined to accept service or act in the matter. Held, on motion for judgment by default of appearance, that the service was bad.*

This was a motion under Rule of Court 329 (d) for judgment by default of appearance. The Deputy-Sheriff's return to the summons was as follows :—

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“On this the 31st day of August, 1889, and at Kimberley, I have duly served the within summons upon the within named defendant, John Robb, by delivering to Ernst Schroder, a clerk in the employ of Daniel Johannes Haarhoff, at the office and place of business of the said D. J. Haarhoff, a copy thereof, the said Ernst Schroder exhibited to me a general power of attorney given by the said defendant to the said D. J. Haarhoff. The said D. J. Haarhoff subsequently called upon me and stated that he declined to accept service of summons or act in this matter.”

*Hopley, C.P.*, moved and submitted that the service was good, but, in reply to the Court, admitted that an agent was not bound to accept service on behalf of his principal.

LAURENCE, J.P. :—I do not think we can hold that there

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has been a good service in this case. Mr. Haarhoff, in his capacity as the alleged agent of the defendant, cannot be held to have been bound by the act of his clerk in accepting the summons, and was entitled, if he thought fit, to decline to accept service. I may add that, according to the stricter practice, when service is effected on an agent, his power of attorney should either be produced to the Court or at all events exhibited to the Registrar. This has been held to be necessary in Natal, in a case briefly reported in the *Cape Law Journal* (see *Guardians of Marcus vs. Jacobson*, 2 C. L. J. 168), and I believe an opinion was expressed by Mr. Justice JONES that a similar course should be adopted in this Court. At all events it seems right that this should be done whenever any doubt exists as to the agency. The Court will make no order on the present motion.

COLE, J., concurred.

[Plaintiff's Attorneys, GRAHAM, VIGNE & MALLET.]

### MOSENTHAL & CO. vs. BRAUN.

#### *Attachment of immovables.—Edictal citation.*

*Where an application was made for the attachment of certain immovable property to found jurisdiction, and for leave to sue by edictal citation, and it appeared that the said property had already been transferred to the applicants as security for the debt in question, and was registered in their names, the Court refused the application.*

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This was a petition for leave to sue the respondent, formerly of Kimberley, but now residing in the South African Republic, by edictal citation in an action of debt, and to attach certain property *ad fundandam jurisdictionem*. The petition alleged "that the said Braun is possessed of certain immovable property situated in Kimberley, being

lot 740 in Otto Street, Newton, with the buildings and erections thereon, which property has been transferred to your petitioners as security for the debt aforesaid, and is at present registered in their name." The application was that the respondent should be interdicted from alienating this property pending the action to be instituted.

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*Wright* moved.

LAURENCE, J.P., inquired how the respondent could alienate the property if it had been transferred to and was registered in the names of the applicants and what there was to shew that the respondent was the owner of property within the jurisdiction.

*Wright* said that the applicants had not acquired the property as owners, but merely by way of pledge or security. All that was really wanted was leave to sue edictally.

LAURENCE, J.P.:—But the Court can't grant such leave unless there is something to found jurisdiction. It appears that so to speak the legal estate in this property is in the applicants, and the respondent has merely an equity of redemption, which does not appear to be capable of attachment. The present application therefore cannot be granted, but the applicants, if so advised, can apply for a rule calling upon the respondent to shew cause why the property should not be sold in satisfaction of the debt.

COLE, J., concurred.

[Applicants' Attorneys, PLAYFORD & FITZPATRICK.]

MANAMELA'S TRUSTEE *vs.* HESSEN.—THE SAME *vs.* PETER.

*Insolvency.—Undue preference.—Proof of Contemplation.—*  
Ord. 6, 1843, § 84.—Act 38, 1884, § 8.

*In actions to set aside certain payments to creditors and alienations of property as undue preferences, where it was*

*proved that the transactions impeached occurred very shortly before sequestration and that at the time of sequestration there was a large deficiency in the estate, but there was no evidence that such deficiency existed at the time of the transactions in question, the Court granted absolution from the instance.*

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These were two actions of undue preference which, at the request of counsel, were heard together. In the former case the plaintiff alleged that the estate of Manamela had been sequestered on or about March 2, 1889, and he had been duly elected and confirmed as trustee. In or about the previous January the insolvent had paid the defendant, one of his creditors, the sum of £470. At the time of such payment he contemplated insolvency and intended to prefer the defendant above his other creditors. The plaintiff claimed that the said payment should be set aside as an undue preference under sect. 84 of Ord. 6 of 1843 and that the defendant should be ordered to pay him the said amount with interest and costs. In the second case the plaintiff alleged that, on or about Feb. 12, 1889, the insolvent had transferred to the defendant, another creditor, a certain stand with buildings thereon, and this transaction he also claimed to have set aside on similar grounds. The defendant in each case denied that the insolvent contemplated insolvency at the time of the transaction complained of or that such transaction constituted an undue preference.

*Lange*, for the plaintiff, put in the *Gazette*, containing the insolvent's notice, dated Kimberley, Feb. 15, of his intention to surrender, and also the schedules, accepted on March 2, from which it appeared that the liabilities were returned at £635 8s. and the assets, including "bad and doubtful" debts to the amount of £223, valued at £308, thus leaving a deficiency of £327 8s. He also called Mr. Vigne, a valuator and sworn appraiser, who had valued the assets, other than the debts, on Feb. 19, for the purposes of the schedules, at £85, and who deposed that such was then the fair value of these assets and that it would have been



much the same in the previous month. He then closed his case.

*Hopley, C.P.*, for the defendants, applied for absolution from the instance. The plaintiff relied entirely on Act 38, 1884, § 8, but had offered no proof that, at the time of the alleged undue preferences, the liabilities exceeded the assets. There was therefore no evidence of contemplation of insolvency. He referred to *Pentz's Trustees vs. Milward*, 4 H. C. 63. [LAURENCE, J.P., referred to *Slater's Trustee vs. Smith & Co.*, 5 E. D. C. 9.]

*Lange* said that he relied on the valuation of assets made on Feb. 19. The Court would presume, in the absence of evidence to the contrary, that the insolvent's position was substantially the same at the time of these transactions, one of which occurred only a week before. The insolvent had kept no books and so it was impossible for the trustee to produce any further evidence except by calling the insolvent himself, who would be a hostile witness.

LAURENCE, J.P.:—In this case we are asked to set aside certain transactions as undue preferences of particular creditors, within the meaning of § 84 of the Insolvent Ordinance of 1843. In order to constitute such a preference, it is necessary for the plaintiff to prove that, at the time of the transaction impeached, the insolvent contemplated insolvency and intended to prefer the creditor in question. The intention to prefer may, in the absence of circumstances disclosing a different motive, be inferred from the contemplation of insolvency, but the latter at least requires to be proved. In the present case, the plaintiff has offered no proof of such contemplation but relies on the presumption created by sect. 8 of Act 38 of 1884. That section provides that “if at the trial of any action brought for the purpose of setting aside any alleged undue preference, under the provisions of the 84th, 85th, 87th, 92nd or 95th section of the said Ordinance, it be proved that the alienation, transfer, cession, delivery, mortgage, pledge or payment, forming the subject of such action, was made, granted or given within six months before the sequestration of the estate of the insolvent, and at a time when his liabilities fairly calculated exceeded

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his assets fairly valued, it shall be presumed that the insolvent at such time contemplated the sequestration of his estate unless proof be made to the contrary by the defendant in such action." Now it appears that the transactions here in question did take place considerably within the period of six months, and indeed very shortly, before the sequestration of this estate. But this is not sufficient; in order to give rise to the presumption of contemplated insolvency, it is necessary also to prove that at the time of the transactions there was an actual deficiency in the estate. Of this however no proof whatever has been offered, but we have been asked to presume that, because there was a substantial deficiency on Feb. 19, the balance was also against the insolvent both in the previous month and earlier in the same month. In my opinion we are entitled to presume nothing of the kind. The suggested presumption does not fall within the class of what are known as "legal presumptions," whether "conclusive" or "disputable," whether *iuris et de iure* or those which are called *praesumptiones iuris* alone and therefore rebuttable; neither has such a presumption as the plaintiff suggests been created by the statute. We are in fact asked to dispense with a material part of the proof, an essential element of the plaintiff's case, and we are not at liberty to do anything of the sort. Many cases might be conceived in which a man might be perfectly solvent one week and hopelessly insolvent the week after. He might suddenly sustain some unexpected loss and so be compelled to surrender his estate. It is said that the same course could not be adopted by the plaintiff in this case, in producing evidence as to the previous state of the insolvent's affairs, as was adopted in that of *Pentz*, which was an action of a similar kind, because the present insolvent has kept no books. If he has neglected his duty in that respect he can be prosecuted for the offence; but such an omission, or offence, on his part does not relieve the plaintiff from the duty of proving his case. If he could not do so in any other way, it was obviously open to him to call the insolvent, and it is no answer that the insolvent would have been a hostile witness; if he shewed himself to be hostile, he could be treated as such. At present there is no evidence whatever before the Court

that these transactions constituted undue preferences and absolution from the instance must therefore be granted, in each case, with costs.

COLE, J., concurred.

[Plaintiffs Attorneys, CALDECOTT & BELL.  
Attorneys for defendant Hessen, COGILAN & COGILAN.  
For defendant Peter, FRAMES & GRIMMER.]

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### LYONS AND STONE vs. STIBBS.

#### *Provisional sentence.—Summons.*

*Provisional sentence refused on a promissory note when the signature of the Registrar was omitted from the copy of the summons served on the defendant.*

Hopley, C.P., moved for provisional sentence on a promissory note.

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Joubert, for the defendant, objected that in the copy of the summons which had been served on him the signature of the Registrar had been omitted. He referred to Rule of Court 12; *Bank of Africa vs. Kimberley Mining Board*, 2 H. C. 150; *Richter vs. De Kock*, 1 Menz. 117; *Van Zyl on Judicial Practice*, 3 C. L. J. 186.

Hopley, C.P., submitted that the copy summons gave the defendant all necessary information and that he was in no way prejudiced by the fact that the signature of the Registrar over the printed words "Registrar of the High Court," had been inadvertently omitted.

LAURENCE, J.P.:—I am under the impression that in the case of *Bank of Africa vs. Kimberley Mining Board* the Court laid special stress on the fact that the name of the plaintiff's attorney was omitted from the copy of the summons served on the defendant, and pointed out that this was a matter on which the defendant, in case he might wish to effect a settlement and for other reasons, was entitled to

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information. This, however, does not appear from the report, neither does it appear whether the Court would have held either of the irregularities there pointed out—the omission of the signature of the Registrar and of the name of the attorney—if standing alone to be fatal by itself. However that may be, the case is undoubtedly to some extent a precedent in favour of the objection now taken, and it certainly ought to have put attorneys on their guard against the repetition of similar irregularities and omissions to those there in question. It is an essential part of the process of the Court that it should be tested and signed by the Registrar, and as the defendant has thought it worth while to take the technical objection that it does not appear from the copy served on him that this was done in the present case, I think the safer course is to allow the objection. Provisional sentence will therefore be refused and the defendant must have his costs of appearance.

COLE, J., concurred.

[Plaintiffs' Attorneys, COGILAN & COGILAN.]  
[Defendant's Attorney, SCHERMBRUCKER.]

PHILIP AND ANOTHER *vs.* BRITANNIA G. M. COMPANY AND  
REGISTRAR OF DEEDS.

*Joint-stock Company.—Act 23 of 1861.—Amendment of Trust Deed.—Ultra Vires.—Amalgamation.*

*At a meeting of shareholders in a joint-stock company, registered under Act 23 of 1861, it was resolved, by the requisite majority under the trust deed, to amend certain clauses thereof, (1) by removing the head office of the company from Kimberley to Johannesburg, (2) by repealing a proviso limiting the maximum voting power of any individual shareholder, (3) by repealing certain provisions with regard to the quorum of directors, (4) by conferring on the directors the power to amalgamate with other companies without any special authority or direction*

*from the shareholders. Certain dissentient shareholders having applied for an interdict restraining the company from acting on these resolutions on the ground that they were ultra vires: held, that the application must be refused as to the first three heads, but that with regard to the fourth the applicants were entitled to an interdict.*

This was an application for an interdict to restrain the respondent company from carrying into effect certain resolutions, passed at a meeting of shareholders, amending in certain respects the trust-deed of the company, on the ground that the same were *ultra vires*, and also to restrain the Registrar of Deeds from registering the said amendments. The joint affidavit of the applicants, Messrs J. W. Philip and A. Yockmonitz, shareholders in the company, set forth the amendments to which they objected and against which they had protested at the meeting. There were a large number of these amendments, but many of them were of a sequential character, and to others no objection was taken, and the objections were in substance confined to four points, viz.: (1) to various amendments in the articles of association the effect of which was to transfer the head office of the Company, which was a joint-stock gold mining company, registered under Act 23 of 1861, and carrying on its mining operations at Johannesburg in the South African Republic, from Kimberley to Johannesburg; (2) to an amendment striking out a proviso that, while every member should have one vote for every share he held, no member should be entitled to poll more than 5,000 votes; (3) to the abolition of a provision that, at meetings of directors, three should form a quorum; (4) to a new clause authorizing the directors "without any further power or authority from the members" to "amalgamate with any other company or companies having objects altogether or in part similar to the objects of this company." To these amendments the applicants objected, as already stated, on the ground that they were *ultra vires*, and involved a departure from the special understanding on which the capital had been subscribed—as to which it was stated that, out of a total issued capital of 120,000 £1 shares, 90,000 had been issued to the vendors—

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and tended to confer on the directors powers inherent in the shareholders and of which they ought not to be deprived. Mr. Philip added that at the time of the formation of the company he had been appointed agent for the vendors, for the purpose of obtaining the necessary capital by means of underwriting, and that the shares had been underwritten under a special agreement, which he annexed, that the head office of the proposed company should be in Kimberley, with two local directors at Johannesburg. On behalf of the respondents an affidavit was filed by the Secretary of the Company, who annexed a copy of the Articles of Association, and stated that at the meeting in question 101,350 shares were represented, of which the applicants represented 3900, and that after lodging their protest they had left the meeting and the resolutions now objected to were then put to the meeting and carried unanimously. On the matter coming on for argument, it was agreed that the hearing of the motion should be taken as the trial of the action.

*Guerin* (with him *Joubert*), for the applicants, observed that the trust-deed was described as the "memorandum and articles of association of the company." Although strictly speaking under our law there was no such "memorandum" as in the case of companies registered under the English law, he contended that the points objected to dealt with matters which should be regarded as practically equivalent to the provisions of such "memorandum" from which departure was incompetent. Clause 2 provided that "The registered office of the company will be situate in the Colony of the Cape of Good Hope;" the company had been registered under the Colonial Act, and the applicants were entitled to object to its removal to a foreign country, under foreign laws and language. [LAURENCE, J.P., referred to clause 6, which provided that "The registered office of the Company shall be in the town of Kimberley, or at such other place in South Africa as the company shall from time to time determine."] He submitted that this clause must be interpreted consistently with and as limited by clause 2, and referred to *Lockhart vs. De Beer's Mining Company*, 4 Juta, at p. 268, and *Queen vs. Registrar of Joint Stock Companies*,

10 Q. B. 839, where it was held that a company registered under 7 and 8 Vict. ch. 110, and thereby "incorporated" by virtue of sect. 25, had no power to change its name. The Colonial Act, 23 of 1861, under which the present company was registered, appeared to have been based on this statute. As to the abolition of the proviso with regard to voting power, he referred to *Brice on Ultra Vires*, 2nd Ed. 55, 868, and submitted that this was a case "where the constating instrument contained special provisions in favour of members or particular classes" which it was now sought to infringe. This proposal changed the whole constitution of the company and affected the rights of shareholders, as it might give the whole voting power to two or three large shareholders, especially in a case where three-fourths of the whole number of shares had been issued to the vendors. Then as to the quorum of Directors, it was most objectionable to permit the quorum to be reduced below three and might lead to the whole powers of management being vested in a single director. [*Hopley, C.P.*, observed that while clause 78 provided that "Three directors shall form a quorum" clause 104 laid down that "The directors may . . . determine the quorum necessary for the transaction of business, but until the Board otherwise determine the quorum shall be three Directors." ] Then as to the power to amalgamate, he contended that to confer this power on the Directors was inconsistent with the decision in *Lockhart's Case* and also referred to *Philipps and others vs. Central D. M. Co.*, 6 Juta, 147.

*Hopley, C.P.* (with him *Lange* and *Williamson*), for the respondents, was called on only as to the second and fourth objections. He said that the only question was whether the proposed alterations affected the object and constitution of the company, or whether they did not, as he contended, relate merely to matters of internal management. Clause 156 of the trust deed empowered the shareholders by a three-fifths majority "to repeal, alter, amend, extend or modify any section or sections or clauses of this deed or to add thereto." He submitted that this covered the proposed amendment as to voting power and the additional power with regard to amalgamation. As to the former point, the

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passages which had been cited from *Brice* referred to cases where it was proposed to create a new class of preferential shares which might prove detrimental to existing shareholders. He referred to *Brice* at pp. 486, 824, 857, 859, 863, 869; *Lockhart vs. De Beer's Company*, 4 H. C. at pp 100, 101, where certain propositions had been laid down by JONES, J., with which DE VILLIERS, C.J., though disagreeing as to their applicability to the facts of that particular case, had expressed his general concurrence on appeal; *Harrison vs. Mexican Railway Company*, L. R. 19 Eq. 358; *Ashbury vs. Watson*, 30 Ch. D. 376; *In re South Durham Brewery Co.*, 31 Ch. D. 261. Then with regard to amalgamation, clause 3 gave the company power to amalgamate with others and there was no reason in principle why this power should not be delegated by the shareholders, if they thought fit, to the Directors or to any one else. Moreover, clause 82 provided that the Directors "may carry out any of the objects of the company," which would include amalgamation, and even if it did not the present application was premature, as it did not appear that any step of the kind was in contemplation. He also referred to *Sheffield Nickel etc. Co. vs. Unwin*, 2 Q. B. D., 214.

*Guerin*, in reply, pointed out that clause 95 of the Trust Deed provided that "any purchase, acquisition or amalgamation of the mining claims, or other property or right of other persons or companies, as also any sale of the company's mining claims proposed to be made . . . shall first be sanctioned by an extraordinary resolution of shareholders in Kimberley, at which meeting the terms or conditions provisionally arranged by the Directors . . . shall be submitted. The shareholders at such meeting may modify any terms of such provisional arrangement, and authorize its being carried into effect either as proposed or modified."

LAURENCE, J.P.:—This is an application which involves the determination of some important questions, and if I entertained any substantial doubt as to what our decision on these questions ought to be, I should have proposed to reserve judgment. But although the questions are important I think they are questions which we are in a position to

decide, and which it is therefore better to decide, without delay. As has been pointed out on previous occasions, in considering the effect of provisions contained in the trust deeds of joint stock companies, registered under our colonial law, we find nothing precisely corresponding with the "memorandum," as distinguished from the "articles," of association of a joint stock company incorporated under the English Acts. Under those Acts the "memorandum" constitutes so to speak a rigid instrument, defining the nature, objects and purposes of the company, and from which, with certain special exceptions, it is incompetent for the company to subsequently depart. Here on the other hand, however, they may be described by the draftsman, we have simply certain articles of association, or as it is commonly called a trust deed, and in the present case these articles include a provision which on the face of it gives the shareholders, by a certain majority, the widest possible powers "to repeal, alter, amend, extend or modify any section or sections or clauses of this deed or to add thereto." The question which the Court has to consider is whether the amendments to which objection has been taken are amendments which, under the clause I have quoted, the shareholders were empowered to make, or whether they, or any of them, must be regarded as an infringement so to speak of the organic constitution of the company, and as constituting or involving such a departure from its essential scope and objects as not to be included within the general power of amendment, and as therefore to furnish sufficient grounds for the granting of the interdict now applied for. Now with regard to the first resolution objected to, that namely for the removal of the Head Office of the company from Kimberley to Johannesburg, it is contended that this is in violation of clause 2 of the trust deed, which provides that "the registered office of the company will be situate in the Colony of the Cape of Good Hope," and that this provision must be regarded as an essential portion of the constitution of the company, and that it was also a provision on the faith of which the share capital was subscribed. Now as to the latter point it is sufficient to observe that, whatever may have been originally agreed between Mr. Philip and the underwriters, the condi-

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tions under which the company was ultimately formed must be taken to be embodied in the trust deed, to which these gentlemen were parties, and we cannot now go behind its provisions. It is next to be noticed that, while clause 2 of the trust deed, under the heading "Memorandum," contains the provision already quoted, we find later on in clause 6, under the heading "Registered Office," a somewhat different provision, as it is there laid down that "The Registered Office of the Company shall be in the town of Kimberley, or at such other place in South Africa as the Company shall from time to time determine." Now if it were worth while to minutely scrutinize the grammatical construction and exact meaning of these two clauses, which at first sight seem hardly consistent, it might be pointed out that while it is stated in clause 2 that the registered office *will* be in the Cape Colony, which may be regarded rather as a statement of intention or anticipation, clause 6 lays down that it *shall* be "in such place in South Africa as the company shall from time to time determine," and that this, rather than clause 2, should be regarded as the imperative provision on the subject. I do not care, however, to press this minute point of verbal criticism or in any way to base my decision on it; for indeed it may be that the deed was drafted by an Irishman, and we know that the Irish are in the habit of inverting what Englishmen regard as the correct use of the two future auxiliaries. I prefer to rest my decision on a broader ground, and to say that even if clause 2 stood alone I should not be prepared to regard it as one which it was incompetent, under the provisions of clause 156, for the shareholders, by the requisite majority, to abrogate or repeal. It appears to me that the situation of the Head Office of a company is precisely one of those matters which it is clearly competent for the shareholders to regulate and define as convenience, from time to time, may dictate, and that it is impossible to maintain that for the shareholders to decide to remove this office to the place where the mining operations of the Company are carried on, while at the same time making due provision for the transaction of the Company's business at Kimberley, is in any way *ultra vires*. There are some pessimists who think that Kimberley, like other mining



towns, may some day become a sort of deserted village; but, without anticipating any such distant or improbable event as that, it seems quite possible that in the case of a gold mining company carrying on business at Johannesburg, it might happen that all or nearly all the persons qualified to be directors were resident at Johannesburg, or that none of them were resident in Kimberley, and it seems clearly necessary that in view of possibilities of this kind the shareholders should not be debarred from deciding such points as where the Company's head office shall be in such manner as they may think most expedient in the interests of the Company. I now proceed to the second point, on which I have felt more difficulty, for undoubtedly the provision that no shareholder, whatever number of shares he might hold, should have more than 5,000 votes, may be regarded as an important provision, and one which in certain circumstances might constitute a valuable security against the wishes and interests of a large number, perhaps of the large majority, of the shareholders, being overridden and disregarded by a few large holders of shares. This in fact is the old question of the "upper limit," which in former years led to so much controversy with regard to the representation of the various claimholders on the Kimberley Mining Board. I may however point out as to this branch of the case that it is not alleged that any stipulation of this kind was made in the original proposals upon which the shares were taken up; and upon the whole I have come to the conclusion that this also must be regarded not as a fundamental matter but as a mere matter so to speak of machinery or internal organization, and that as by a large majority the shareholders, at a meeting at which no one could poll more than 5,000 votes, have decided for the future to abolish this restriction, that decision is one with which this Court is not entitled to interfere. Then as to the third point, the quorum at directors' meetings, as has already been pointed out, the striking out of the direction on this subject, that three shall be a quorum, contained in clause 78, of which the applicants complain, really seems to leave matters as they were before, since clause 104 gives the directors power "to determine the quorum necessary for the transaction of business," while

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adding that "until the board otherwise determine the quorum shall be three directors." I think that the provisions of clause 104 on this subject must be regarded as explaining or developing the direction contained in clause 78, and that therefore the striking out of this direction must be regarded as merely a verbal amendment, to which no objection can be successfully urged. Lastly, I come to the question of the proposed new clause, authorizing the directors, on their own responsibility, "to amalgamate with any other company or companies having objects altogether or in part similar to the objects of this company." Now undoubtedly a power to amalgamate (using the word in the popular, not in the technical, sense) already exists in the trust-deed, and such amalgamation with other companies has been defined as among the objects for which the company was established. But I think it is also clear that, as the articles now stand, this is a power which can be carried out only by the authority and with the consent of the general body of the proprietors, and that this is so indeed expressly appears from the provisions of clause 95, which were referred to by counsel for the applicants in reply. Moreover, if, as has been contended, the directors already possess this power, under their general powers of management, what is the object of this proposed new clause? I do not think that they at present possess any such power and I am of opinion that the applicants are entitled to object to the new clause by which it is proposed to confer it on them. What is the meaning of "amalgamation"? The word is not a very convenient one to employ in legal phraseology, owing to its vague and ambiguous meaning; but I take it that the process of company amalgamation, as here understood, is really a kind of fusion of interests, which may be effected in more than one manner. Under this clause I presume that it would be competent for the directors, perhaps at a very small meeting, and by a bare majority, without consulting the wishes of the shareholders, of whom they are really merely the executive agents, to hand over all the property and assets of the company in return for shares in another company, and to merge the Britannia Company in such other company, in which case the shareholders might find that without their knowledge or

consent they had become members of another association, with different objects, rules, powers, and liabilities, and with which they might strongly object to be connected. Or on the other hand the directors might arrange to incorporate some other company with the Britannia, and to pay for the property thus acquired either in cash or possibly by a large issue of additional capital. In whichever way the thing might be done, the objects and constitution of the company would or might be entirely changed and I think therefore that the applicants are entitled to object to the vesting of such extraordinary powers in the hands of the directors, and to regard the maintenance of the provisions of clause 95, namely that any such step before its final adoption should first be sanctioned by a special resolution of shareholders, as an inherent portion of the constitution of the company and one which it is incompetent to abrogate in the manner now proposed. I think too that in thus deciding this point we shall be ruling in accordance with the spirit of the decisions in the cases in the Supreme Court to which reference has been made. The result is that, while the other portions of the application will be refused, the respondents will be interdicted from carrying out the resolution empowering the directors to amalgamate with other companies without the sanction of the shareholders. As each party has succeeded with regard to a substantial portion of the matters in dispute, I think that each party should pay their own costs.

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COLE, J., concurred.

[Applicants' Attorneys, KNIGHTS & HEARLE.]  
[Respondents' Attorneys, CALDECOTT & BELL.]

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#### JACOBSON vs. NITCH.

*Promissory Note.—Co-obligors.—Joint and several liability.*

*J. and L. made a promissory note, beginning "We promise," &c.  
Held, on the authority of Kilson vs. Campbell and Jooste,*

2 *Menz.* 279, that the liability thus created was both joint and several.

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Nitch.

G. H. Nitch, Manager of the Kimberley Branch of the Standard Bank, as the legal holder, sued T. Jacobson and L. Lazarus in the Magistrate's Court at Kimberley on a promissory note made in the following terms:—

Kimberley, June 29, 1889.

On the 5th August next we promise to pay H. L. Lloyd, Kimberley, or order at the Standard Bank the sum of £42 14s. 3d. for value received.

(Signed)            THOMAS JACOBSON.  
                             L. LAZARUS.

On the case coming on, the defendant Lazarus was in default and the defendant Jacobson pleaded a tender of £21 7s. 1½d., with interest and costs, as his proportionate share of the debt. The plaintiff admitted the tender. The Magistrate gave judgment for the plaintiff for the amount claimed with costs, the one defendant paying the other to be absolved. Jacobson appealed.

*Hopley, C.P.*, for the appellant, said that the case of *Kidson vs. Campbell and Jooste*, 2 *Menz.* 279, to which the Magistrate had referred in his reasons, was no doubt against him, but he submitted that the decision in that case was wrong, that the true rule was that laid down in *Rens vs. Cantz and others*, *ib.* 231, and that the liability arising on a document made and signed in this form was only joint and not both joint and several. Moreover *Kidson vs. Campbell and Jooste* dealt only with the case of endorsers, and the facts involved the element of insolvency, which might have affected the decision; in any case the observation with regard to joint acceptors must be taken merely as an *obiter dictum*. [LAURENCE, J.P.:—Do you admit that the position of joint makers of a note is the same as that of joint acceptors of a bill?] He admitted that no distinction in principle could be drawn between the two cases, but contended that the *dictum* with regard to the latter was unnecessary for the purposes of the decision on the point actually raised in



*Kidson's Case*. The English authorities were clearly in favour of the liability in a case of this kind being only joint. [LAURENCE, J.P., said that was so and referred to *Byles on Bills*, 13th Ed., p. 7, and *Story on Promissory Notes*, 7th Ed. p. 68.] In the argument in *Kidson's Case* allusion had been made to the Scotch law, but a reference to *Bell's Dictionary s.v. 'Co-obligant,'* p. 212, shewed that the joint and several obligation inferred on bills and promissory notes was a mere usage of trade. Then as to the Dutch law, in *Heineccius, ed. Reitz*, referred to in the same argument, there was merely at p. 200 a bald assertion in a note by the editor of joint and several liability in such cases, while at pp. 279, 280, it was laid down that two or more persons could give a bill either with joint and several liability (*als mede schuldigen of zaakwilden*) or without any such undertaking, but that even in the latter case, according to *Berger* and *Wernher*, they could not avail themselves of the *beneficium divisionis*, especially if they were merchants or partners. Then in a note *Heineccius* adds that "whereas the jurisconsults are not yet agreed whether and to what extent those who have signed a bill together can avail themselves of the privilege, it is more advisable that the creditor should get the bill signed thus:—'We the undersigned . . . pay for this our *sola* of exchange both for each and each for both' or 'all for each and each for all,' etc." *Reitz in loc.*, note 15, says that where there are no such words as "each in *solidum*," or "*voor 't geheel*," the jurisconsults were divided in opinion as to whether the *beneficium divisionis* could be claimed or not. For authorities against such claim he referred to the *Utrecht Consultations*, *Franck* and *Uhl*, which were not in the library here, also to *Schorer on Grotius*, note 513, and to a decision in *Neostadius*. *Schorer's* note seemed to be based entirely on a single decision of the Court of Flanders, quoted from the *Précis du droit Belgique*, while *Neostadius*, *Decis.* 49, referred merely to a decision as to the custom among the merchants of Antwerp, and *Voet*, 45, 2. 4, *sub fine*, adverting to this decision, said that in Holland and indeed generally, in *Hollandia ac fere vulgo*, the opposite rule obtained, and that one of several co-obligants if sued *in solidum* could obtain the benefit of division. It was clear from the

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citation by *Reitz* that this must have been a case on a bill of exchange. *Groenewegen, de leg. abr., ad cod.* viii. 40, laid down that an obligation *in solidum* was never understood unless there was an express agreement that each should be so liable, "*een voor all ofte elk sonderling*," or a custom to that effect as at Antwerp. In support of his view he cited a decision of the Supreme Court of Holland in *Neostadius*, referred to as *Decis.* 98 apparently by a clerical error for *Decis.* 97. That was a case on some written acknowledgment of debt, as the word *instrumentum* shewed, and the Court held that each of the obligors was liable only *pro parte virili*, "*siquidem correi debendi non sint, qui indefinite in eandem summam simul consentiunt, sed ii demum qui unam eandemque summam singuli dare spondent*." As to *Van der Keessel*, in *Th.* 595 he referred to *Heineccius* iii. 28, and *Reitz*, note on p. 134, which passages clearly dealt with co-obligors who had specially bound themselves as *correi debendi* or *medeschuldigen*. The general rule being that the liability of co-obligors was only *pro rata*, he contended on the authorities that the exception in the case of bills and notes existed only in certain districts and by special customs. If the exception in such cases had been part of the general law it would have been mentioned by such authorities as *Grotius*, iii. 3. 8-11; *Van Leeuwen*, iv. 4. 1, *Kotzé's Transl.* ii. 36; *Voet*, 45, 2. 2; *Pothier, tr. Evans*, 3rd Ed. i. 230; *Van der Linden, tr. Henry*, pp. 203, 204. *Pothier* and *Van der Linden* actually gave the exceptions to the general rule and yet made no mention of bills or notes. He also referred to *Alcock vs. Du Preez*, Buch. 1875, at p. 132; *De Pass vs. Colonial Government*, 4 Juta, at p. 290, as shewing that the general principle that the liability of co-obligors, unless otherwise agreed upon, was only joint, had been specially recognized as being the law of this Colony. There was nothing to shew that the CHIEF JUSTICE, in the latter judgment, when he spoke of "certain well-known exceptions" had in view cases like the present.

*Guerin*, for the respondent, contended that the case of bills and notes formed one of the recognised exceptions to the general rule as to joint liability, and submitted that the Court was bound by the decision in *Kidson vs. Campbell and*

*Jooste*, which had never been overruled, and was supported by such authorities as *Heineccius*, *Van der Keessel*, and *Schorer*.

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LAURENCE, J.P.:—If this question had been *res integra*, I should have felt inclined to differ from the view taken by the Magistrate. The English law is certainly in the appellant's favour; and after listening to the analysis and discussion of the Roman-Dutch authorities with which the *Crown Prosecutor*, in his interesting and able argument, has supplied us, I feel by no means convinced that those authorities, when thoroughly examined, are against him. According to the general principle both of the English and of the Dutch law, when two or more parties undertake an obligation, the liability, unless otherwise expressly stipulated, is merely joint and not both joint and several; each of the co-obligors, or *correi debendi*, is liable only *pro rata* or, as some of our authorities express it, *pro parte virili*. It was, however, decided by the Supreme Court in the case of *Kidson vs. Campbell and Jooste*, after an elaborate argument and in a considered judgment, that an exception to this general principle exists in cases where the liability is founded on a bill of exchange and that "joint acceptors, drawers, and endorsers are liable *singuli in solidum*, unless the contrary is expressed in the bill." The *Crown Prosecutor* admitted that no distinction in principle could be drawn between the position of joint acceptors of a bill and that of joint makers of a promissory note; and therefore that decision, which was delivered nearly half a century ago and which it is admitted has never been overruled, seems clearly to govern the case now before us and to justify the decision at which the Magistrate arrived. There is no doubt a danger against which English or Scotch Judges administering the law of this Colony, have to be constantly on their guard; the danger, I mean, of adopting decisions or statements of the text-writers as laying down general principles of the Roman-Dutch law, which on a closer examination may prove to be merely decisions or statements as to the customs of particular districts or as to the law merchant as interpreted by particular courts, and to constitute deviations from, rather than illustrations of, the

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general law of the Netherlands. It is possible that, as suggested by the *Crown Prosecutor*, the Supreme Court in *Kidson's* case may have fallen into this error: but, however that may be, I think we are bound to follow their decision. The appeal must therefore be dismissed, with costs. At the same time I should like to add that if this appeal had been brought before the Supreme Court, as now occupying the position of the former Court of Appeal, and if I had been sitting in that Court when it came on for decision, I am by no means certain that my judgment would not have been in favour of the appellant.

COLE, J., concurred. (a)

[Appellant's Attorneys, PLAYFORD & FITZPATRICK.  
Respondent's Attorneys, GRAHAM, VIGNE & MALLET.]

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FOURIE vs. OLLETT.

Ord. 16, 1847.—Act 29, 1889, § 2.—*Trespass.—Measure of damages.*

*Certain cattle, the property of D., having trespassed on F.'s land, the damages were assessed, in the manner provided by the Pound Ordinance, at £7 17s. 6d., together with £1 2s. 6d. as expenses of the award. While the cattle were being driven to the pound, they were rescued by O., acting in concert with D., and the latter, who lived beyond the jurisdiction, recovered possession of them. O. was prosecuted under Sect. 31 of the Ordinance and fined £5, which was paid to F., who subsequently sued him for damages. The Magistrate granted absolution on the ground that no damage had been proved. Held, on appeal, that there was *prima facie* evidence of damage exceeding the amount of the fine, and that the case must therefore be remitted for further hearing.*

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Fourie vs. Ollett.

J. Fourie sued J. F. Ollett before the Magistrate of Kimberley for £15 as damages sustained by the defendant's

(a) This judgment was confirmed on appeal by the Supreme Court on Feb. 12, 1890.

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contravention of sect. 31 of the Pound Ordinance, 16 of 1847, in rescuing certain twenty-eight head of cattle lawfully seized in order to be impounded by the plaintiff. The defendant first pleaded that for the alleged wrongs he had already been criminally convicted and sentenced to pay a fine of £5, and it was admitted that this was so, and that the fine had been paid to the plaintiff, as provided by sect. 55 of the Pound Ordinance. The Magistrate overruled this plea, on the authority of *Van der Westhuyzen vs. Raubenheimer*, Buch. 1875, 37, and the defendant then pleaded denial. The plaintiff's evidence was to the effect that he had found twenty-eight oxen, the property of one Davis, a resident in the Free State, trespassing on his property, which was enclosed with wire and on which he had vegetables and growing crops, the cattle having broken through the fencing. He told Davis that he could have his cattle on payment of £5, or if he was not satisfied he would send for the Field Cornet to assess the damage, and, on Davis declining to pay this sum, he had sent for the Field Cornet and two landowners, whose certificate he produced, shewing that they had assessed the damage at £7 17s. 6d., in addition to which he had paid £1 5s. to the Field Cornet and 7s. 6d. to each of the landowners for their expenses. (It subsequently appeared, however, on reference to sect. 42 of the Pound Ordinance, that the fees of reference should have been 7s. 6d. to each of the three assessors, or £1 2s. 6d. in all.) After this he had sent the cattle to the pound, but while on the way they had been rescued by the defendant, in company with Davis, and the latter had obtained possession of them. It was impossible to recover damages from Davis, who, as already stated, lived in the Free State. In cross-examination the plaintiff stated that the Field Cornet and the landowners had agreed as to the amount of damage, but the latter only had signed the certificate. When he claimed £5 he was not aware of the extent of the damage. After the plaintiff had given his evidence, and his attorney had stated that he had no further evidence as to the damage, the Magistrate granted absolute judgment from the instance with costs, on the ground that "there was no evidence to shew that any damage whatever



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arose from the acts complained of, and defendant (*sic*) has already secured the benefit of the fine imposed upon the defendant at the criminal prosecution." The plaintiff appealed.

*Hopley, C.P.*, for the appellant, submitted that the reasons given by the Magistrate for his decision were in conflict with the evidence, which shewed that the damages had been assessed by the tribunal created by the Ordinance at £7 17s. 6d., together with the costs of the inquiry, for which the owner was liable under the Ordinance, while the plaintiff had only received £5. It was clear that Ollett and Davis were acting in collusion, and that it was through the action of the former that the plaintiff had been prevented from recovering these damages through the poundmaster from the latter. [LAURENCE, J.P.:—The reference to the Field Cornet and two landowners under § 41 of the Ordinance seems to apply only to cases of damage under sect. 33, *i.e.* in unenclosed property, while this is a case under sect. 32.] The provisions of sect. 41 are expressly extended to sect. 32 by Act 29, 1889, § 2. [LAURENCE, J.P.:—The Field Cornet in this case has not signed the certificate, although sect. 43 provides that the award shall be signed by all three assessors, or, when they do not agree, by any two of them.] If an award signed by the two landowners would be sufficient when they did not agree with the Field Cornet, *a fortiori* it must be so when they did. The omission of the signature of the Field Cornet seems to have been merely an inadvertence and ought not to affect the validity of the award.

*Guerin*, for the respondent, contended that the only question was as to the amount of damage, which was a question of fact and a matter for the Magistrate to decide. He referred to *Van der Westhuyzen vs. Raubenheimer, ubi supra*. [LAURENCE, J.P.:—The certificate would have been evidence of damage to the poundmaster, as provided by the Ordinance.] Moreover the certificate was informal, as though the evidence was that there was no disagreement it had been signed by only two of the assessors. The Magistrate was entitled to conclude on the evidence that damage exceeding the amount of the fine had not been proved.



LAURENCE, J.P.:—I think this appeal must be allowed. The evidence shews that the plaintiff had sustained damage through the trespassing of the cattle of Davis and that this damage had been assessed, in the manner provided by the Ordinance, at £7 17s. 6d., and an award given for this amount. It is true that the mere putting in of the award would be no proof of the amount of damage if the question had to be investigated by the Court, but it proves that the award was made, and on that award being handed to the poundmaster it would be his duty, as laid down by the Ordinance, to detain the cattle impounded until the amount of the award, together with the costs of the inquiry, was paid by the owner. It is true that the award was not signed by the Field Cornet, but on the face of it it was not irregular in form, as an award signed by two of the referees, when all cannot agree, is sufficient, and the poundmaster would therefore have been entitled to presume that this was a valid award. Moreover, as the referees were in fact unanimous, it may be presumed that the signature of the Field Cornet would have been appended if required, on the omission being pointed out. It appears therefore that, had it not been for the unwarrantable intervention of the respondent, the appellant would have been able so to speak to effect a lien on these cattle for damages and expenses to the amount of £9, whereas the amount he has actually recovered by way of fine is only £5. There was therefore, in my opinion, *prima facie* evidence of additional damages to the amount of £4, which, on the authority of *Van der Westhuyzen vs. Raubenheimer*, the plaintiff would have been entitled to recover, and the Magistrate's judgment of absolution was at all events premature. In the absence of any consent by the respondent to an alteration of the judgment to one for the plaintiff for that amount, the proper course will be for the Court to allow the appeal with costs, and remit the case to the Magistrate for further hearing, the costs in the Court below to abide the result.

COLE, J., concurred.

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[Appellant's Attorney, D. J. HAARHOFF.  
Respondent's Attorneys, COGHILAN & COGHILAN.]

## BEIT vs. LOGAN.

*Contract of Sale.—Mistake.—Cancellation.*

*L. sold B. certain shares "cum rights," for which B. paid on obtaining L.'s guarantee that he would deliver all rights accruing thereon as soon as received. B. subsequently sued L. for certain bonus shares, as being the rights in question, or in the alternative for cancellation of the contract. L. denied that the shares claimed, which had already accrued and been received by him at the time of the contract, passed thereunder and contended that the accruing rights referred only to future dividends. Held, on the facts, that the parties had not understood the terms of the agreement in the same sense, that therefore there had been no concluded contract, and B. was entitled to an order for cancellation and repayment unless L. elected, as apparently would be more to his advantage, to perform the contract in the sense claimed by B. or pay damages in lieu of such performance.*

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The plaintiff in this action, a speculator at Kimberley, sued the defendant, a contractor at Matjesfontein in the District of Worcester, and who had agreed that the matters in dispute should be heard and determined by the High Court, for (1) the delivery of  $33\frac{1}{3}$  shares in the Worcester Exploration and Gold Mining Company or £750 as damages, (2) £300 damages for delay in delivering the said shares, or (3) in the alternative the cancellation of the contract of sale in respect of the said shares and repayment of the purchase money. The declaration alleged that on Jan. 5, 1889, the plaintiff, through Mr. Conradi, a broker, purchased from another broker, Mr. Robinson, acting for the defendant, certain 100 shares in the Worcester Company "cum rights" for the sum of £1600, as appeared from the broker's note annexed. The words "cum rights" referred to certain rights to which shareholders in the said company, registered as such on Nov. 30, 1888, were entitled, viz., the right to obtain from the company one share at par in a new issue of

shares for every three shares so held, and it was accordingly meant by the broker's note that, in addition to the 100 shares therein mentioned, there were likewise sold  $33\frac{1}{3}$  shares in the new issue which the defendant undertook to deliver to the plaintiff. The defendant was at this time a director of the Worcester Company, and had obtained all the new shares to which he was entitled, but the plaintiff was not aware that at the time of the contract these shares had in fact been distributed to and received by the defendant. On Jan. 10 the plaintiff paid the purchase price and received from the defendant 100 shares in the old issue of the Company, together with a written guarantee that he would deliver the said rights, which however he had subsequently refused to do, whereby the plaintiff had sustained damage, etc. He therefore claimed delivery of the said shares or damages, and in the alternative submitted that, if the defendant understood the contract otherwise, there was never any mutual understanding or final contract, and accordingly prayed that the contract might be cancelled and the defendant ordered to repay the purchase money, with interest at 8 per cent. from January 10, on the plaintiff tendering the return of the 100 shares together with £15 subsequently received as dividend thereon. The defendant pleaded that he had instructed his broker to sell 100 shares at £16, and that he had refused to accept the broker's note unless the word "rights" was defined, and that thereupon a document was drawn up which he signed, and of which he annexed a copy, by which he guaranteed to deliver to the plaintiff all rights accruing on the said 100 shares as soon as they should be received, *i.e.* the rights accruing from the date of sale, and it was upon this understanding that the defendant accepted the broker's note. The rights referred to in the plaintiff's declaration did not accrue after the sale on January 5, 1889, but had accrued long previously, to wit, on November 30, 1888, and had been delivered to the defendant on December 14, and were not included in the rights referred to in the broker's note. The plaintiff joined issue on this plea.

On behalf of the plaintiff the evidence of his representative, Mr. Bruch, by whom the shares had been purchased, taken on commission, was to the effect that he understood

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the "rights" purchased to be as stated in the declaration, and otherwise would not have given so high a price for the shares. These shares were dealt in at Kimberley "cum rights" till about January 20, when the first sale "ex rights" which he had been able to trace took place. At the time of the contract he was not aware that the defendant had already received the "bonus" shares in question. He had subsequently instructed the broker to get the guarantee redeemed, and on his failing to do so had written to the defendant on the subject. After some correspondence, he had had an interview with the defendant on May 15, when the latter definitely repudiated the plaintiff's construction of the guarantee and refused to deliver the additional shares. The value of Worcester shares at this time was from £10 to £12. The witness added that he had never known the word "rights" to be held equivalent to dividends or to future rights, when, as in the present case, there was an opportunity of registering the shares in the buyer's name at once, and in this he was corroborated by other witnesses. In cross-examination he admitted that he did not know at the time of the contract that the defendant was a registered shareholder on November 30; he knew that some of these bonus shares had already been issued to registered shareholders. The guarantee was in the usual form and had been drawn up by Conradi, who had not consulted him as to its terms. Mr. Conradi, in his evidence, corroborated Bruch as to the course of dealing in these shares. Before he closed the contract, he had required Robinson to disclose his principal, in order to satisfy himself that the latter was "good enough" to deliver the rights. Having done so, he drew up the broker's note and guarantee, and handed them to Robinson, who brought back the latter signed by the defendant. He did not remember having had any interview with the defendant personally in the matter. Two or three days afterwards the 100 shares were delivered, with the guarantee attached, and the purchase money was then paid by the plaintiff. If these shares had been purchased *ex* rights it would have reduced their market value by nearly a quarter. In cross-examination he admitted having seen an advertisement issued by the Company, of which a copy



was produced, and from which it appeared that all applications for these bonus shares had to be made, by shareholders registered on November 30, on or before December 10, after which date no applications would be entertained. If the defendant had said that he only meant future rights, he could not have closed the transaction. He had purchased Worcester shares "cum rights" on a contract similar in form on the same day from Mr. King, and four days later from Mr. Robinow, and in both cases the vendors had delivered the bonus shares. Mr. King corroborated this statement, and said that he had sold 200 Worcesters on January 5 "cum rights" at £16, and had given a guarantee which he had subsequently redeemed by delivery of  $66\frac{2}{3}$  bonus shares at par. These shares had been in his possession at the time of the contract, but he had had to get the certificates split before he could deliver them. The defendant gave evidence in support of his plea and stated that, after receiving the broker's note, he had seen Conradi and informed him that the only "rights" which he would sell that he was aware of consisted in a dividend which would shortly be declared, and that the expression must not be taken to include anything already received. In point of fact he had received all his bonus shares on December 14, and at the time had in his possession  $33\frac{1}{3}$  shares which he had received in respect of the 100 shares sold to the plaintiff, and these bonus shares were sold by him a few days afterwards, on or about January 10. Conradi, the defendant added, gave no definite explanation of what he understood by "rights," but said he would send a written agreement, and subsequently Robinson brought the guarantee written by Conradi, which the defendant signed. Mr. Finlayson the defendant's agent at Kimberley, corroborated his evidence as to the interview with Conradi, and Robinson also remembered the fact of the interview, and that there was a discussion on the subject, but could not recollect what was said. The defendant also stated that a dividend had been declared on January 15, which he had not received. In reply to the Court, he stated that the present value of the shares was about £10 or £12. This was the only occasion on which he had given a guarantee of this kind,

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though he had had several other transactions in Worcester shares. He had also purchased shares in other companies, and had held them for long periods without registration, but in such cases had never applied for a guarantee of rights accruing thereon. The case having been argued by

*Hopley, C.P.*, for the plaintiff, and

*Lange*, for the defendant,

*Cur. adv. vult.*

*Postea* (December 11),—

LAURENCE, J.P., said :—The plaintiff in this action claims (1) delivery of certain  $33\frac{1}{3}$  shares in the Worcester Gold Mining Company, alleged to have been sold to him by the defendant under a certain contract made on the 5th January last, together with damages for the delay in delivery ; (2) in the alternative, damages for non-delivery of the said shares ; or (3) as another alternative, the cancellation of the contract and repayment of the purchase money. The defendant pleads that he has already performed his part of the contract in question. The contract was embodied in a broker's note by which the plaintiff purchased from the defendant 100 shares in this Company at £16 "cum rights," and the phrase "cum rights," the meaning of which is now in dispute, was further explained in a guarantee signed by the defendant on the date of the contract and accepted by the plaintiff, by which the defendant agreed to deliver "all rights accruing on certain 100 shares in the Worcester Company," of which the numbers are specified, "standing in my name as soon as the same shall be received by me." It is obvious that the meaning of this word "rights," as used in the contract, is not self explanatory, and the dispute has arisen owing to the different meanings attached by the parties to this phrase. The plaintiff sets forth fully in his declaration what he understood thereby, and I need not repeat his allegations in detail. It will be sufficient to state briefly that he contends that the effect of the phrase "cum rights" was to entitle him to the gratuitous delivery of one share in a certain new issue of the Company's shares for every three that he

purchased, *i.e.* to  $33\frac{1}{3}$  shares in all. The declaration, however, alleges that the "rights" consisted in the right to obtain from the Company an additional share, not gratuitously, but at its par value, for every three shares held by the shareholders, registered as such on November 30, 1888, among whom, as is admitted, was the defendant, in respect to the shares sold by him to the plaintiff in January; and that being so, taking the evidence of Mr. Bruch, the plaintiff's representative, given on commission, in conjunction with that of his broker, Mr. Conradi, who distinctly states that "rights meant the right to acquire one bonus share at par for every three," and that of another dealer, Mr. King, who acted on this view in a precisely similar transaction on the same date, I am certainly of opinion that the plaintiff in claiming these shares should have tendered their par value and actual cost, namely the sum of £33 6s. 8d. As, however, the defence is not based on this ground, and it is admitted that even had such a tender been formally made, it would have been rejected, I do not think I need say anything further on this point, or that it can affect our judgment on the main question in dispute. The defence raised is in substance that the "rights" referred to by the plaintiff had already been received by the defendant; that at the time of the contract they were not "rights accruing" within the meaning of the guarantee, and that all the defendant contracted to deliver was any rights which might accrue subsequent to the date of the contract—*e.g.*, any dividends which might be declared and paid before transfer of the shares in the Company's books. The case seems to me to be one in which the Court must come to one of three conclusions. Either we must hold that the meaning of the contract was, with the qualification I have already mentioned, as alleged by the plaintiff, in which case he would be entitled to specific performance or damages as claimed; or the defendant is right in his construction, and therefore entitled to our judgment; or, lastly, it may be that the plaintiff understood one thing and the defendant another, and the parties in consequence were never *ad idem* and the case therefore was one of those thus described by *Pollock on Contracts*, 2nd Ed. 399, 400:—"It may happen that each

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party meant something, it may be a perfectly well understood and definite thing, but not the same thing which the other meant. Thus their minds never met, as is not uncommonly said, and the forms they have gone through are inoperative.” I now proceed to briefly examine the evidence in order to ascertain which of these three conclusions is that to which it points. In the first place, taking the evidence as a whole, I can feel no doubt that when Mr. Bruch, as the plaintiff’s representative, made the purchase, he understood the effect of the contract and guarantee to be as now contended for, and that he would not have given the price he did had it not been for this understanding. We did not feel justified in admitting evidence as to the meaning attached to this phrase “cum rights” when used by other parties in contracts relating to shares in the same Company, but I see no reason to doubt the evidence of Messrs Bruch and Conradi to the effect that the reason why the phrase “rights” was not more precisely defined was owing to the notoriety of its meaning at the period of this transaction in the local market. Moreover, the evidence of Mr. Bruch, in which he is strongly corroborated by Mr. King, another dealer of large experience, that the words “cum rights” could not be understood as merely referring to future dividends, which would belong to the purchaser as a matter of course, is, I think, obviously correct, and is indeed to a great extent supported by the defendant’s admissions as to his own practice and experience in dealing in shares both in this and other Companies. It may further be pointed out that an exactly similar transaction took place on the same day, through the same broker, at the same price, in the same scrip, and on the same terms, with Mr. King as vendor, and that Mr. King delivered what the plaintiff now claims from the defendant as passing under the contract. It also appears that Mr. Robinow, another vendor, did the same thing four days afterwards. The defendant of course is in no way bound by the action of these gentlemen, or by the meaning which they attached to their engagements; but I am now dealing with what was understood by Mr. Bruch, and I certainly cannot hold that the plaintiff ever intended to pay the defendant £1,600 for 100 shares at a time when, if he had happened to buy from King,

he would have obtained 133½ shares for £1,633 6s. 8d. Dealers like Mr. Beit and Mr. King, and also brokers like Mr. Conradi, are too well acquainted with market prices for it to be possible to hold that such a disparity could exist or, in other words, that Mr. Bruch should be willing to pay £16 for what Mr. King was willing to sell at about £12 5s. I may add that I am also satisfied that Mr. Conradi, although he may not have been as careful as he should have been, understood the contract in the same sense; and it appears to me that if he had made any different agreement with the defendant he would have been exceeding his mandate and his principal would not have been bound by his action. But before we can hold that there was a binding contract in the sense alleged by the plaintiff we must also be satisfied that the defendant understood, or at all events ought to have understood, the matter in the same light. Now if Mr. Logan had been in the habit of dealing in this market, and had had, or could be shewn to have been cognisant of, previous contracts in similar terms, the case would have been very much stronger against him. But in point of fact he had only just arrived from Johannesburg and it does not appear that he had been engaged in or aware of any such transactions there. On arriving in Kimberley, he simply gave instructions for the sale of 100 Worcester shares. On these shares at the time there were in fact no rights accruing, unless the dividend can be regarded as such, as the right to the bonus shares had already accrued and been realised. These bonus shares, however, were actually in his possession at the time, and there was nothing to prevent their delivery, and the plaintiff might well have supposed that he had not yet received them, or at all events that the certificate might have to be split before the *pro rata* portion in question could be delivered. At the same time, where there is a conflict of evidence between Conradi on the one hand and the defendant and his witnesses on the other, the weight of evidence seems to be with the latter, and I can only conclude that an interview did take place between Conradi and the defendant, which the former has forgotten, and that the defendant did then give his version of what he understood by "rights" more or less as he stated in his evidence. There is nothing, however, in the evidence

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of either Logan, Robinson, or Finlayson, as I pointed out at the time, to shew that Conradi ever agreed to this view, and for the reasons already given I am of opinion that when he obtained the defendant's signature to the written guarantee he was under the impression that the matter had been arranged on the basis contended for by the plaintiff. And this view is, I think, confirmed by Robinson's admission, in reply to the Court, that Conradi did require his principal to be disclosed in order to ascertain whether he was "good enough." He could scarcely have wanted to know whether a man who sold shares on Saturday on the terms of "cash against scrip" was "good enough" to deliver on the following Monday; the question, in my opinion, must clearly have related to the guarantee to deliver the accruing rights. The main difficulty in my mind as to the facts of the case has been to understand how, assuming the interview between Conradi and Logan to have taken place, any misunderstanding could have arisen; and I cannot help surmising that the former, being anxious from his own point of view as broker that the transaction should go through, and thinking that, the guarantee once signed, no difficulty could subsequently arise, was not as careful as in the circumstances he should have been in explaining what he meant to buy. However, as already pointed out, even if Conradi's conduct is open to this observation, it would not affect the plaintiff any more than he would have been bound if Conradi had delivered to him a bought note "*cum* rights," and at the same time delivered to the vendor a sold note "*ex* rights." However this may be, taking the evidence of the defendant and his witnesses as to what took place at the time in conjunction with the position subsequently and throughout assumed by the defendant, as shewn by the correspondence, I am on the whole inclined to the conclusion that the plaintiff has failed to establish that the contract was clearly understood by the defendant in the sense alleged. The result is that there was no *consensus ad idem*; the plaintiff understood one thing and the defendant another, and consequently there was no completed contract. That being so, on the authorities, specific performance of the contract could not have been obtained, and either party who has acted upon it



under an erroneous apprehension that there was a binding agreement is entitled, as far as practicable, to *restitutio in integrum*. As Mr. *Leake* puts it in his "Digest of the Law of Contracts," p 331:—"If it appear that each party mistook the meaning of the other and that they intended different things by the same expression, then the basis of agreement fails and the contract is avoided." . . . "Thus where the particulars of a sale by auction were ambiguous as to including or excluding the timber, and the vendor and purchaser accepted them with the different meanings, it was held that specific performance could not be decreed upon either construction" (*ibid.* p 330 : *Higginson vs. Clowes*, 15 Ves. 516). Another case still more directly in point is that of *Denny vs. Hancock*, 6 Ch. 1, quoted by *Pollock* at p. 417, where it was held that "When the purchaser erroneously but not unreasonably supposes a portion of property to be included which is of no considerable quantity, but such as to enhance the value of the whole, this is a mistake between the parties as to what the property purchased really consists of, so material that the contract will not be enforced." Similarly in *Baxendale vs. Seale*, 19 Beav. 601, it was held that "Where the terms of the contract are ambiguous, and where, by adopting the construction put upon them by the plaintiff, they would have an effect not contemplated by the defendant, but would compel him to include in the conveyance property not intended or believed by him to come within the terms of the contract," specific performance could not be granted. And further, as *Pollock* points out at p 432, where a party "has actually paid money as in performance of a supposed valid agreement, and in ignorance of the facts which exclude the reality of such agreement, he may recover back his money as having been paid without any consideration (the action for 'money received' of the old practice—see *e.g.* *Cox vs. Prentice*, 3 M. & S. 348). He paid on the supposition that he was discharging an obligation, whereas there was in truth no obligation to be discharged." For these reasons I should hold the plaintiff entitled to the relief claimed, somewhat inartistically, in par. 12 of the declaration (as I have several times pointed out the "prayer" should never be included in the paragraphs

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in which the allegations are to be set forth, but should form a separate conclusion to the pleading)—except that I think the rate of interest should be 6 per cent. only—but for one fact which leads me to suggest a variation in what would otherwise be the order. What the plaintiff has mainly insisted on is his right to the relief claimed in paragraph 10 of the declaration, and he at all events must be satisfied if the Court grants that relief, and therefore it seems to me in the circumstances that, if this would in fact be more favourable to the defendant in its effects than an order for cancellation and repayment, the defendant is entitled to exercise his option in the matter. On the evidence before us it appears that such would be the case. According to Mr. Bruch, on May 15th, when, if there was a contract, the breach must be fixed to have taken place, the market value of these shares was from £10 to £12, and according to the defendant's evidence their present value is much the same. I therefore take the value at both periods at £10. Hence it appears that when the defendant refused to deliver these  $33\frac{1}{3}$  shares the plaintiff could have replaced them for the sum of £333 6s. 8d., and he would therefore be entitled under the claim for specific performance to an order for the delivery of the said shares against payment of their par value of £33 6s. 8d., or in default to £300 as damages for their non-delivery. But the effect of cancellation would be that on delivery of shares, stated to be now worth £1,000, together with the £15 received as dividend, the plaintiff would be entitled to repayment of £1,600 with interest at 6 per cent. from the date of payment to that of judgment. I presume therefore that the defendant will prefer for the Court to make the former order, but unless he consents to that course—without prejudice of course to his right of appeal—the order will be as just stated. With regard to costs I have felt a good deal of doubt, and at first was rather inclined, considering that both parties might be regarded as to some extent responsible for the mistake, to leave each party to pay his own costs. But as the plaintiff has established his claim to the relief sought, and as I think that the defendant, if not at the time of the contract, at all events when the claim was made in his

letters by Mr. Bruch and before action brought, might and ought to have satisfied himself that his position was an untenable one, on the whole there appears to be no sufficient reason for departing from the ordinary rule that the costs must follow the result.

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COLE, J. concurred. (a)

[Plaintiff's Attorneys, H. C. & J. C. HAARHOFF.  
Defendant's Attorneys, CALDECOTT & BELL.]

### MARGOSCHIS vs. DUTOITSPAN MINING BOARD.

#### *Negligence.—Embankment.—Flooding.*

*M. sued the Dutoitspan Mining Board for damages sustained owing to the flooding of his premises, which he attributed to the negligence of the defendants in making a certain embankment and road without providing a sufficient outlet for the surface water. The defendants, while admitting the flooding, pleaded that the embankment in question had not increased the obstruction to the flow of water in that locality previously caused by other constructions not under their control, and further alleged that the culvert they had made in their embankment would have proved sufficient had it not been for the bursting of a certain drain, for which they were not responsible, which had caused a large quantity of extraneous water to flow in this direction, and also for the fact that their culvert had been blocked by a cask which had been washed into it, and which, without any negligence on their part, had prevented the escape of the water and so caused the damage.*

*Held, on the facts, that the dimensions of the culvert made by the defendants were insufficient to provide for the escape of the water which in the event of heavy rain might be expected to flow in this direction, irrespective of any extraneous water or accidental obstruction; that the defendants had therefore been guilty of negligence, and as*

(a) This judgment was altered on appeal by the Supreme Court, on Feb. 24, 1890, into one of absolution from the instance, with costs.

*the inadequacy of their culvert was the immediate cause of the flooding must be held responsible therefor, notwithstanding the circumstance that the escape of water in this direction had been formerly impeded by other constructions of a similar character, the owners of which, previous to the erection by the defendants of their embankment, might have been held responsible for any resulting damage.*

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This was an action for damages sustained by flooding. The plaintiff, a storekeeper at Dutoitspan, alleged that the defendants, early in 1889, had constructed an embankment for the purposes of a roadway in the mining area in the neighbourhood of the plaintiff's premises in such a manner that it obstructed the natural flow of the water which after rain flowed past the said premises, and had wrongfully and negligently failed to provide a sufficient outlet through the said embankment for such water, or to maintain the culvert or outlet made by them in good and sufficient repair. On Oct. 23 there was a heavy rainfall, and by reason of the premises the water was unable to escape, and was dammed back and flooded the plaintiff's premises, causing damage to the extent of £3000, which the plaintiff now claimed. The defendants, while admitting the construction of the road, denied the alleged negligence or that the construction in question had obstructed the natural flow of the rain water in a greater degree than it had been previously obstructed by other embankments formed by other persons in the neighbourhood of the plaintiff's premises before the construction of the said roadway. They also alleged that the culvert in their embankment was amply sufficient to carry off the natural flow of the rain water, and that it was maintained and kept in good order. They admitted the flooding and that it caused some damage, but denied that it was due to the causes assigned by the plaintiff. They further pleaded that the said flooding was partly due to an unnatural or extraordinary and unexpected flow of water towards the premises in question owing to the breaking and overflowing of a large catchwater drain constructed by the L. & S. A. Exploration Company, and for which the



defendants were not responsible, and partly to the accidental blocking of the defendants' culvert by a cask which was carried into and blocked the said culvert, by reason whereof, without any negligence on the part of the defendants, the water was unable to escape.

The hearing of the case occupied three days, a great deal of evidence being called on both sides, of which, however, a comparatively brief outline will here suffice. It appeared that the plaintiff's premises, in which he had carried on business for some years, and which were situated in the mining area, lay between two tramlines, raised on embankments, the property of mining companies, and were on a level with the old North Circular road, which ran immediately in front of them. About a year before the flooding, the defendant Board constructed a new high level road, about 12 ft. high, in the place of the old one, for the convenience of the heavy traffic of coal wagons etc. of the mining companies in the neighbourhood. This road was constructed mainly by levelling the debris heaps in the vicinity and so making an embankment of uniform height on which the road ran. Previous to this construction, the surface water coming down between the above mentioned tramways used to escape through a culvert in the embankment of the Compagnie Générale slightly lower down. The plaintiff had complained of the defendants' culvert as inadequate for the purpose in a letter written by his attorneys to the Board in Jan. 1889, of which no notice appeared to have been taken, the culvert having been made some time before. On Oct. 22 there was a very heavy rain and hail storm, nearly an inch of rain falling in less than an hour, and about an inch and a half in the twenty-four hours. The plaintiff's premises were flooded on that day up to a height, as was stated, of about 18 in., but as this occurred in the afternoon and evening, and his manager was on the spot, he was able to prevent any serious damage to the stock. On the following afternoon it again began to rain heavily and continued throughout the night, about 3½ in. of rain falling between 3 P.M. on the 23rd and 9 A.M. on the 24th. On the morning of the 24th the plaintiff's premises were almost completely submerged, and it was

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afterwards ascertained that the water had risen inside his store to the height of about  $4\frac{3}{4}$  ft., causing damage to the stock to the extent, as was proved, of nearly £900, besides damage to the structure and woodwork, and other loss sustained by the plaintiff through the subsequent interruption of his business, and loss of rental from certain native tenants in adjacent buildings who were flooded out. The water at this time was far above the level of the culvert, both at intake and exit. It appeared to be choked at the exit, where some of the stones and rubble, which formed a retaining wall, had fallen in from above the mouth and appeared to be damming the water back. Two professional witnesses were called on behalf of the plaintiff, Mr. Newdigate, a Government Land Surveyor, and Mr. Day, a civil engineer. These gentlemen had been called in to inspect the premises on the 24th, and gave evidence as to their being then nearly submerged and the culvert completely blocked. On the following day they were able to take measurements, when the culvert was found to be at the intake 2 ft. wide by 2 ft. 8 in. high, and at the exit 1 ft. 9 in. wide by 2 ft.  $1\frac{1}{2}$  in. high. The exit was then choked, a good deal of the road having apparently fallen in above it, and the water was bubbling through. A week afterwards Mr. Newdigate again measured, the culvert meanwhile having been cleaned out, and found the dimensions the same at the intake, but that it was both wider and higher by 6 in. at the exit. The exit of the defendants' culvert was higher at the bottom by nearly 3 in. than the intake, and the bed of the culvert was about a foot—the plaintiff's witnesses said 9 in. and those for the defendants 15 in.—below the level of the plaintiff's store. The culvert of the Cie. Générale lower down was rather smaller, but appeared to have been somewhat better and more evenly constructed than that of the defendants. It appeared from a plan made by Mr. Newdigate, shewing the drainage area, the only outlet for the water flowing from which was through this culvert, and which was admitted to be substantially correct, that this area covered about 450 acres, upon which, according to the evidence as to the rainfall, about 5,635,000 cubic feet of water fell on the day in question. According to the professional witnesses called

for the plaintiff, about half of this quantity of water would run off, while the witnesses for the defence estimated that a larger proportion would be absorbed, and only from 30 to 40 per cent. would escape, the exact percentage being admitted, however, by both sides to be very uncertain. According to Messrs. Newdigate and Day, even if the rainfall had been uniform during the period in question, in order to carry the water off safely the culvert should have been 6 ft. wide by 2 ft. high, while if over an inch fell in an hour it would have had to be 20 ft. wide to carry it off. On the other hand, the defendants' professional witnesses, Messrs. Stent and Dale, both of whom were civil engineers of considerable experience, were of opinion that, had not the culvert been accidentally obstructed, it would have been practically sufficient for the purpose, though, if there had been a free outlet for the water beyond, it might have been safer to make it somewhat larger, *i.e.*, about 3 ft. wide by 2½ ft. in height. As to the water which had overflowed from the Exploration Company's drain, there was also a considerable conflict in the evidence, the plaintiff's witnesses asserting that in their opinion very little, while those for the defendants considered that a large quantity, of this water had escaped into the drainage area in question and thus increased the volume of water which this culvert had to carry off. The witnesses for the plaintiff admitted that, even if the defendants' road and culvert had not been there, his premises, owing to the inadequacy of the culvert of the Cie. Générale, would have been flooded, though not quite to the same extent. The witnesses on either side also made widely different estimates as to the capacity of the defendants' culvert and the rate at which, if unobstructed, it would carry off the water flowing down to it. As to the obstruction alleged to have been caused by the cask, the evidence was that the culvert on the 24th appeared to be choked at the exit, as if part of the road had fallen in, but on the afternoon of the following day it was cleared out and a barrel, which was produced in Court, and which was 2 ft. high by 1½ ft. in diameter, was found close to the exit mouth, where some stones had fallen down and so apparently had caused it to get stuck against the roof. There was no direct evidence

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to indicate when this took place, but there was no doubt that as soon as the barrel became stuck it must have materially obstructed the escape of the water, the remainder of which flowed off very rapidly after its removal.

*Lange* (with him *Joubert*), for the plaintiff, referred to *Solomon vs. Dutoitspan D. M. Co.*, 1 H. C. 1, and *Austen Bros. vs. Standard D. M. Co.*, *ib.* 363. In the latter case the culvert which was found insufficient was much larger and the drainage area much less than in the present. He contended that the defendants' culvert was much too small and not kept in proper repair. As to the overflow from the Exploration Company's drain, it was for the defendants to prove that this substantially increased the flooding, which he argued had not been shewn. With regard to the cask, there was nothing to shew that it got into the culvert before the Friday, the 25th, and in any case, if the culvert had been wide enough, it would have gone through or caused no serious obstruction. He also referred to *Harrison vs. Great Northern Railway Co.*, 33 L. J. Ex. 266, and argued that in the present case the defendants' culvert was the *proxima causa* of the damage.

*Hopley, C.P.* (with him *Williamson*), for the defendant Board, admitted that the law on the subject had been correctly laid down in the cases cited, but distinguished the facts and argued that the culvert was sufficient and, had it not been for the foreign water and the choking by the barrel, would have carried off all the surface water without any substantial damage being caused to the plaintiff. It was clear that the cask must have got in when the culvert was running full and before the water rose to a higher level. The defendants in making their culvert would naturally look to the dimensions and proximity of that of the Cie. Générale below, and theirs was in fact the larger of the two. He contended on all the facts that, although there had been some damage, no *iniuria* had been proved.

*Cur. adv. vult.*

*Postea* (Dec. 14), --

LAURENCE, J.P., said:—The plaintiff in this action, a storekeeper at Dutoitspan, sues the defendant Board for £3,000 damages sustained owing to the flooding of his premises in October last. This damage he attributes to the negligence of the defendants in constructing a certain embankment and road without providing a sufficient outlet for the escape of surface water, the only outlet provided being a culvert, which he alleges was insufficient in size, faulty in construction, and not kept in proper condition and repair. It appears that the plaintiff's premises are situated immediately below this high level road, that on either side of them are tramways running on embankments the property of mining companies, and that such is the configuration of the land that a large quantity of surface water, in the event of heavy rains, has to run off in this direction and can find no outlet save through the defendants' culvert. The defendants, while admitting that the plaintiff sustained damage by flooding, though not to the extent alleged, deny the alleged negligence or the insufficiency of their culvert. They further plead specially three grounds of defence—firstly, they say in substance that by the construction complained of they made no alteration in the *status quo ante* and in no way diminished the provision previously existing by way of outlet for the water or increased the obstruction thereto; secondly, they say that their culvert was sufficient to carry off all the water which in the natural course would, or could have been expected to, have come in this direction, but that on the occasion in question there was, as is admitted, a very heavy rainfall, which caused a certain drain, the property of the L. & S. A. Exploration Co., and not under the defendants' control, to burst or overflow, in consequence of which a large quantity of foreign or extraneous water, which could not have been anticipated, and for which the defendants were not bound to make provision, was diverted in this direction, and so caused the damage; lastly, they go on to allege that the culvert, although otherwise adequate for the purpose, was blocked or choked on this occasion through a certain cask being washed down and getting stuck in the culvert, which, as they contend, was an accident for which and the consequences of which they were not in any way responsible.

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On these pleas issue was joined, and the case was heard at great length during three full days of the present week. At the close of the argument it appeared to me that certain points had been advanced with considerable force and ability, which it was desirable to take time to fully consider. I have accordingly devoted to their consideration such time as, since Thursday evening, has been at my disposition for that purpose, and I would certainly have taken further time and again gone minutely through all the notes of the evidence, had I any reason to think that my ultimate conclusion and judgment would be affected by such a process. On the whole, however, it appears to me that no advantage and some inconvenience would result from further postponing our decision. Perhaps it would be scarcely fair to describe the case as having been overlaid with scientific, technical and professional evidence, for undoubtedly the matter is an important one to the parties and they were quite justified in supplying the Court with all the data which in their view could have any bearing on the result. At the same time the professional evidence in some of its directions and developments really could scarcely, as I ventured to remark, have been more elaborate and complicated had we been a Parliamentary Committee dealing with a project like that of the Manchester Ship Canal or some other engineering scheme of an equally extensive and important description. Now without wishing to pay less than the average amount of attention and respect which Judges and juries are in the habit of bestowing on the evidence of experts, I am bound to say that there was a great deal of that evidence to which it is impossible to assign very much weight, as the witnesses themselves admitted that it was largely hypothetical and speculative in its character, and however correct their processes and calculations may have been they were to a great extent based on premises of the most uncertain and precarious character. Now if a case of this kind between a shopkeeper on the one side and a corporation, or company, or public body, on the other, had been tried by an average jury, whether special or common, I have no doubt, on the evidence adduced, what the verdict would have been. We, as Judges, are I hope not liable to the influence of prepossessions and



prejudices of the same kind as are frequently found to influence the views of juries, especially in dealing with actions brought by individuals against corporations, of whom I think it was Sydney Smith who remarked that they have neither a body to kick nor a soul to save; but perhaps on the other hand we have to be on our guard against a tendency to undue refinement in speculation, and to laying too much stress on theoretical doubts and possibilities. We have really to endeavour to look at the case like a practical, common sense, and unprejudiced jury, and to say whether in our opinion the plaintiff has proved, not as a mathematical demonstration but to our reasonable satisfaction, that the defendants are responsible for the damage of which he complains. Now in the first place it is clear that if they are not responsible nobody else is; there is no plea of contributory negligence; there is no suggestion that any one else could or ought to have been sued. Either there was an *iniuria* by defendants, or it is a case of *damnum sine iniuria*, of loss without injury, a conclusion to which a Court of Justice is always reluctant to be forced. If, however, the defendants are to be held responsible, it must be remembered that they are not guarantors; negligence on their part must be proved, or at all events an absence of that *exactior diligentia*, or more than ordinary care, which in cases of this kind the people who make these constructions are bound to exhibit, as laid down in the cases of *Solomon vs. Dutoitspan Mining Co.* and *Austen vs. Standard D. M. Co.*, cases in which it is admitted that the law applicable to these matters was correctly laid down in this Court. The case on these authorities is one in which *culpa minima præstat*; it remains to inquire whether such *culpa* has been proved. Now with regard to the first of the defendants' special pleas, I will dispose of it at once. It is no answer in law for B (the Board) to say to A (the plaintiff) that "if I had not damaged you, you would have been equally damaged by C (a company)." The defendants say in effect that they were not bound to provide for more water than could find an outlet in this direction, and that, having in view the adjacent debris heaps and embankments, and the dimensions of the adjoining culvert, almost immediately below, in the embank-

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ment of the Compagnie Générale, ample provision was made by them for any water which could possibly escape through this channel. Now to begin with, it may be observed that the defendants' road and embankment, with its culvert, being substantially nearer the plaintiff's premises than the embankment and culvert of the Company, undoubtedly filled up what has been described as a "cube," or a certain block of space, over which the water might otherwise have spread itself, and that the consequence apparently was that the water rose higher, though not to a material extent, in the plaintiff's premises, than might otherwise have been the case. But apart from this it need only be pointed out that, had it not been for the defendants' embankment, the Compagnie Générale might before this rainfall have widened their culvert, and, if they had not, they would have been liable for any damage caused by its insufficiency. As things now stand, clearly the Compagnie Générale are not responsible for the damage and the defendants by their interposition have practically put themselves in their place. I think the illustration I suggested during the argument is not an unfair one, namely, that if an action were brought by a passenger against a railway company for injuries sustained owing to the negligence of one of their servants, say a signalman, it would be no answer for the company to plead that, even had their signalman done his duty, a mistake had been made lower down the line by a pointsman at a junction, in the employ of another Company, which would have led to equally serious injuries being sustained by the plaintiff. The fact is that in law we have not to ascertain the *causa sine qua non*, or investigate what the metaphysicians describe as the *causa causans*; we have simply to look to the *causa proxima* or *directa*, which is legally responsible for the result. No doubt it may have been very natural, and in accordance with common-sense, for the defendants in making their culvert to look at the means of outlet below; but if the result was that the water was dammed back at their own culvert and so caused damage, the existence of other culverts equally or even more inadequate further down does not help their case. Next, with regard to the question of the foreign water, I am

rather inclined to agree with Mr. *Lange's* contention that, as to this, the burden of proof is rather on the defendants to shew that this was the real cause of the damage, and it is certainly impossible to hold, on the evidence adduced, that this has been satisfactorily proved. However, it appears to me that the correct course to adopt is to examine the question whether, eliminating the foreign water from our consideration, adequate provision was made by the defendants for the water which in the ordinary course might be expected, having due regard to local meteorological conditions, to run off from the catchment basin or drainage area for which this was the only channel of escape. The area in this case is admitted to have been a very large one—about 450 acres. The rainfall here is known sometimes to be exceedingly heavy and torrential in its character. In the present case about  $3\frac{1}{2}$  in. fell within twenty-four hours; in *Austen's* case I think it was proved that  $4\frac{1}{4}$  in. fell within a similar period. The latter amount may therefore perhaps be taken as the maximum for which an engineer, determined to avoid even *minima culpa*, might be expected to provide. If that amount were exceeded a plea of *vis maior*, not raised here, might perhaps succeed. But even taking the actual quantity which fell in this case, it means nearly 6,000,000 cubic feet. The evidence leaves it extremely uncertain how much of this might be expected to infiltrate or percolate the surface and be absorbed and how much to run off. This depends on the question of whether there had or had not been previous rains, exhausting the absorbent capacity of the soil, on the nature of the soil, on the lie of the land and on many other data. According to Mr. Tripp, an engineer cited by the late Mr. Gamble, a very high authority as an hydraulic engineer, in the paper which was referred to, the percentage in South Africa might in certain circumstances vary as much as from 2 per cent. to 70 per cent. In the present case, Mr. Newdigate and Mr. Day estimate the quantity at 50 per cent., Mr. Dale at 40 per cent. and Mr. Stent at 30 per cent. But as the rainfall in the present case was by no means the highest on record, and as Messrs Dale and Stent do not deny that their percentage might be exceeded if the absorbent capacity of the soil had previously been exhausted, as I think

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owing to the very heavy storm of the 22nd October may have well occurred to a great extent in the present case, it does not seem to me that 3,000,000 cubic feet, or 18,000,000 gallons is a quantity of water in excess of what a prudent engineer in a case like the present might be expected to provide for. Now as to the capacity of the defendants' culvert there is a great conflict of evidence. I think Mr. Newdigate for the plaintiff put it at about 350,000 and Mr. Day at about half a million gallons per hour, Mr. Dale for the defendants at a million and a half and Mr. Stent at about a million. These contradictions between professional gentlemen, on questions of fact and calculations of figures, certainly seem surprising; but on the whole it appeared that the explanation really lay in the different allowances made for "head," or superincumbent pressure of the water behind as affecting the velocity of its flow, and the result at which I have arrived—though without any pretension to absolute accuracy in the matter—is that before the water could escape at the rate asserted on behalf of the defendants it would require to be assisted by a "head" which having regard to the level of the culvert and that of the plaintiff's premises—though even on these points the witnesses do not agree and I can only take a rough average—would represent water standing in the plaintiff's shop at the height of something like  $2\frac{1}{2}$  ft., and by which therefore the greater portion of the damage now complained of would probably already have been caused. It will be remembered that the much smaller rainfall of the previous day caused the water to rise to about 18 in. in the plaintiff's store. I think, moreover, that the calculations of the defendants' witnesses are subject to this criticism, that they might be very convincing and satisfactory if the flow of the surface water, after very heavy rain, was at anything like a uniform rate. But common experience, here at all events, seems to shew that such is by no means the case. For the first few hours you may have a sort of torrent or river, far overflowing the ordinary channel, and proceeding with great velocity, while as the rainfall becomes steadier and less torrential the flow diminishes enormously in speed and volume. For this phenomenon I conceive that considerable allowance should be made, and for



all these reasons it appears to me that, in order to provide for all contingencies, the defendants' culvert ought to have been, in order to avoid all risk of flooding, as nearly as I can judge, about twice its present breadth, while it would have done no harm if it had also been somewhat higher. Now having arrived at this conclusion, namely that the culvert was inadequate for its purpose, I do not think I need spend much time in analysing the tale of the tub. On the evidence it is quite uncertain when this tub got into the culvert and whether it did or did not materially contribute to the flooding. More than one ingenious theory has been broached on the subject of the cask on either side, but the matter is one of pure conjecture. It seems, however, clear that if the culvert had been of sufficient dimensions for its normal purpose on the basis already indicated, the cask could have done no harm; and that being so, whether it did or did not contribute to the damage, it scarcely seems material to inquire. If it did, the reasons why it stuck appear to me to have been three. Firstly, the culvert, for the reasons already assigned, was too small; secondly, it was faulty in construction, being smaller at the exit, where the cask stuck, than at the intake; thirdly, it was not in good repair, having been made with rubble and large stones, very liable to come away, in the retaining wall and immediately over the exit mouth, and some of these stones in fact came down and contributed to block the exit, already too low, and thus caused the cask to get stuck. For these reasons it appears to me, after giving my best consideration to the matter, that none of the defendants' pleas have been substantiated, and, although the case is in some respects a hard one, they have failed to shew such an entire absence of negligence as to enable us to acquit them of liability for the damage sustained. It must also be observed that the plaintiff, through his attorneys, appears several months previously to have called the attention of the defendants to the risk which their method of construction involved. As to the damage, very little need be said. The defendants had an opportunity afforded them of inspecting it, of which they declined to avail themselves, and we can therefore only go by the evidence of the plaintiff and his witnesses, which does not appear to be unreasonable or

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greatly exaggerated. It appears that after the inundation he found that his stock was worth, at cost prices, about £1,360. Stock to the value of £360 was uninjured, and the remainder could only be sold by auction, the net proceeds amounting to £112. As to the value of the stock he is corroborated by independent evidence and damage is thus shewn to the extent of about £890. He also says that there was other stock, floating about and reduced to a pulp, upon which he could put no value, but which he thinks may have been worth about £200. As to this, however, he is uncorroborated and he has been unable to produce any documentary evidence, such as invoices, to support his claim, and if he was unable to value this "pulp" I do not see how the Court can be expected to do so. Then he further claims for loss of takings during the interruption of his business and loss of rental owing to his tenants having been flooded out. Taking a fair average of his profits from these two sources during the weeks immediately preceding the flooding, they may be put at about £6 10s. a day, or say £65 for the ten days which elapsed before summons. This makes £955 in all. There is a further claim for woodwork, shelving, &c., damaged, which the plaintiff puts at £60. He admits, however, that under this head he has only expended £2 on repairs. Still, damage of this kind is recoverable whether the objects injured are replaced or not; the amount spent on repairs, if actually incurred, is only material as evidence of the extent of the damage. On the whole, and considering that on the other heads only the minimum damage actually proved up to date of summons has been allowed, I do not think it would be unreasonable to allow an additional £45 under this head. There will therefore be a judgment for the plaintiff for £1,000 and costs.

COLE, J., concurred.

[Plaintiff's Attorneys, H. C. & J. C. HAARHOFF.]  
[Defendants' Attorney, D. J. HAARHOFF.]

BRITANNIA G. M. CO. *vs.* YOCKMONITZ.

*Joint Stock Company.—Principal and agent.—Payment by Company of brokerage to director.—Ultra vires.—Mistake in law.*

*The directors of a joint-stock company authorized one of their number, a broker, to make certain investments on behalf of the company. He accordingly bought and sold certain shares, and on such sales, after deducting the usual brokerage, paid over the net proceeds to the company. The company afterwards sued for recovery of the brokerage. Held, that the action could not be maintained.*

The plaintiff company in this action sued the defendant, a sharebroker at Kimberley, and who until recently had been a director and trustee of the company, for the recovery of two sums of £9 and £21 5s. respectively. The declaration alleged that at meetings of the Board of Directors, held on April 18 and 25, 1889, it had been resolved to invest £10,000 of the company's working capital in "first class main reef Johannesburg Gold Mining Stocks," and that the defendant and another director, Mr. Philip, should be empowered to invest this sum in such stocks at their discretion. The defendant thereafter, acting or purporting to act under this authority, had bought and sold certain shares on behalf of the company, himself acting as broker and retaining the usual brokerage of 1 per cent. on such sales, particulars of which were set forth in the declaration, and which sums the plaintiff's now claimed. The defendant pleaded that he and Mr. Philip, who was also a sharebroker at Kimberley, had been employed to make the investments in question at a reasonable remuneration, and that he had duly fulfilled the said agency and in doing so had sold the shares referred to. He admitted that he had retained the amounts specified, which were due and owing to him by the company as such reasonable remuneration as aforesaid, and had been deducted with the knowledge and consent of the company, who allowed the same. The respective balances had been duly paid over to the

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company, with accounts shewing the amounts of the said deductions and the reasons therefor, and had been duly received and accepted by the company in full discharge and satisfaction. The plaintiffs in their reply alleged that, even if the directors did appoint and employ the defendant as alleged, such employment was *ultra vires* and illegal, and did not entitle him to retain the moneys now sued for. The defendant joined issue.

The only witness called for the plaintiffs was the Secretary of the Company, who produced the Trust Deed and the Minute Book. From the latter it appeared that at the meetings of the Board on April 18 and 25, at which the resolutions referred to in the declaration were passed, four directors were present, including Messrs. Philip and Yockmonitz. At subsequent meetings various purchases and sales by the defendant were reported and approved, and on May 29, at a meeting at which he was not present, the Secretary had reported receipt of his "cheque for £891, being net proceeds of the sale of the 200 Durban Roodepoort G. M. Co.'s shares purchased by him for account of the company." This was one of the two sales referred to in the declaration, the other having been a sale of certain shares in the Nooitgedacht Gold Mining Company, on Aug. 28, subsequent to which there had been no meeting of the then board, a special meeting of shareholders having been held in September, at which the directors were removed from office and others appointed in their place, by whom the present proceedings had afterwards been instituted. The defendant gave evidence in support of his plea, in the course of which he stated that he and Philip were both members of the local Stock Exchange, one of the rules of which was that dealers must buy and sell through brokers. The resolutions of April had been passed in the belief that he and Philip were more likely to invest the moneys in question to the advantage of the company than if outsiders had been employed. As to the Minute of May 29, the broker's note in the usual form, shewing the full amount of the purchase price, *i.e.*, £900, had accompanied the cheque therein mentioned, and a similar course had been adopted on the subsequent sale of the Nooitgedacht shares. In

cross-examination the defendant admitted that the Nooitgedacht shares, being shares in a Klerksdorp company, were not within the terms of the April resolution, which referred only to first-class Johannesburg stocks, but an objection to this line of cross-examination was sustained on the ground that the plaintiffs in their summons and declaration had not impeached these transactions as not being in accordance with the resolution, but merely claimed a refund of the brokerage paid thereon. The defendant added that in all his transactions on behalf of the company he had acted in consultation with Philip, and admitted that in some cases he had purchased from him when his price was lower than that at which he could have bought from anyone else. In reply to the Court he stated that the company had realized a profit on the transactions. He admitted that his interest as a broker in speculating with this £10,000 would have been to multiply the sales. He was not aware of any Stock Exchange rule against brokers not charging the usual commission. Mr. Philip corroborated the defendant's evidence, and added that of the £10,000 authorized only about £3000 was actually invested, and on this a profit had been realized for the company of over £1000. It appeared that a similar action had been brought against this witness by the company in the Magistrate's Court for the refund of commissions retained by him, and they had recovered judgment against him. The other directors who were present at the April meetings were also called, and stated that Messrs. Philip and Yockmonitz had been employed in the matter as being largely interested in the company, and therefore likely to do their best for it. They had understood at the time that the usual commission would be charged.

*Hopley, C.P.* (with him *Lodge*), for the plaintiffs, referred to sect. 115 of the trust-deed, by which the remuneration of directors was fixed at a guinea for each attendance at Board meetings "and such additional sum (if any) as shall be fixed by general meetings from time to time." The defendant had been employed in this matter in his capacity as a director, and as such was not entitled, in the absence

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of special authority from the shareholders, to any additional remuneration. By sect. 107 the Board were empowered to delegate any of their powers to committees, and Messrs. Philip and Yockmonitz must be held to have acted in these transactions as a committee of the Board. Sect. 96 provided for the disqualification of directors, and laid down that a director shall vacate his office, among other grounds, "if he be concerned in or participate in the profits of any contract with the company or in the profit of any work done for the company." He referred to *Lindley on Company Law*, 5th ed., 328, 362-367, 388; *York and North Midland Railway Company vs. Hudson*, 16 Beav. 485; *Southall vs. British Mutual Society*, 6 Ch. 614; *Imperial Mercantile Credit Association vs. Coleman*, L. R. 6 H. L. 189, at p. 198. [LAURENCE, J.P., referred to sect. 82 of the trust-deed, clause 5, which empowered the directors to "sell any property of the company, either for cash or for shares, and generally for such considerations and upon such terms in every respect as they may think fit," and inquired whether this did not imply a power to effect such sales by means of a paid agent when expedient.] The resolution now in question did not merely authorize the sale of specific property by means of an agent, but amounted to a general delegation of the powers of the directors, which was *ultra vires*. Sect. 86 gave the directors wide powers to invest the company's funds, and to vary such investments, but these powers ought to be exercised either by the Board or by a committee thereof, in their capacity as such, and without any additional remuneration; *Brice on Ultra Vires*, 614; *Cartmell's Case*, 9 Ch. 691. Even if the £9 commission on the first sale, that of the Durban Roodeports, could be regarded as having been paid under a mistake of law, there could be no similar defence as to the later sale of the Nootgedacht shares, there having been no subsequent meeting of the Board at which the net proceeds were accepted.

*Guerin*, for the defendant, contended that a distinction must be drawn between his position as director and his capacity as agent, in which he had acted in this matter. He referred to *Thring on Joint Stock Companies*, 4th ed. 97;



*Parker vs. McKenna*, 10 Ch. 96, at p. 118, *per* Lord Cairns; *Lindley on Partnership*, 4th ed., 1. 588. The cases cited were cases in which a surreptitious profit had been made by agents, and did not apply to the present facts. He did not admit this to be a case of "profit," and even if it were the facts were known to the directors, whose knowledge was that of the company. Sect. 84 of the trust deed expressly gave the directors power to appoint any persons, whether directors or not, to be agents for the transaction of the company's business, with such powers and at such commission or remuneration for their time and trouble as the Board should think fit. [LAURENCE, J.P.:—The section says "to appoint in the South African Republic or elsewhere," which might be construed as meaning "elsewhere" than at the seat of the head office, where the Board met, and which was at Kimberley.] Again, clause 8 of sect. 82 provided that the Board may appoint, and at their discretion remove or suspend, such secretaries, managers, officers, clerks, agents, and servants, for permanent, temporary or special services as they may from time to time think fit, and may determine their duties and fix their salaries and emoluments." [LAURENCE, J.P.:—It might be contended that "agents" here referred only to officers *eiusdem generis* with those previously mentioned and would not cover the appointment by the directors of one of themselves to act as broker for the company. However, as the facts stand, I do not think we need trouble you further.]

*Hopley, C.P.*, in reply, referred to *Allion Steel and Wire Co. vs. Martin*, 1 Ch. D. 580, and *North Eastern Railway Co. vs. Jackson*, cited in *Fisher's Digest*, new ed., ii. 373, from 19 W. R. 198, where it was laid down that "a director is not allowed to make any profits from the business of the company while he is director, or to receive any other remuneration for his services, professional or otherwise, than such as the resolution of a general meeting may have sanctioned."

LAURENCE, J.P.:—The question to be determined in this case is one of considerable interest and importance, but on the facts before us I do not feel any such doubt as to what

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our decision ought to be as to render it advisable to reserve judgment. I say on the facts before us, for I do not propose in deciding the present case to go in any way beyond what the exigencies of the case itself require, or to express any opinion as to what might have been the result had the circumstances been otherwise, or to discuss contingencies which have not yet arisen. In the present case the plaintiff Company allege that the defendant, who is a sharebroker at Kimberley, while holding the position of a Director and Trustee of the Company, and acting or purporting to act under certain resolutions of the Board of Directors, sold in his capacity as broker certain two parcels of shares on behalf of the Company and, instead of paying over the gross proceeds of such sales, deducted therefrom certain sums amounting together to £30 5s., and which represent 1 per cent. of the total proceeds of these sales, which sums he has refused to pay over and which the plaintiffs now claim. The defendant pleads in substance that he effected the sales in question as the duly authorised agent of the Company, that he deducted the amounts now claimed as being due and owing to him as reasonable remuneration for his services in the matter, and with the knowledge and consent of the Company, and he adds that the respective balances were duly paid over to the Company, together with accounts shewing the amounts of the said deductions and the reasons therefor, and which were duly received and accepted by the Company in full discharge and satisfaction. Now it seems to me that this case must be regarded as being in substance an action for moneys had and received by the defendant to the use of the plaintiffs, and it is for the plaintiffs to shew that the facts are such as to enable them to maintain this action and recover these sums. With regard to these facts in the first place it is admitted by the *Crown Prosecutor* that, looking at the various provisions of the Company's Trust Deed to which reference has been made, it was competent for the directors to effect these sales, and also competent for them to delegate their power to buy and sell shares on behalf of the Company to one or more of their own number. But he proceeded to contend that this power could be delegated to the defendant only in his capacity as

a director, and that in that capacity he was precluded from receiving any remuneration other than that defined by the Trust Deed. The Trust Deed, as I have already pointed out, scarcely states this in express terms; but it does provide that, among other causes which shall disqualify a director and cause him to vacate his office, is "being concerned or participating in.....the profit of any work done for the Company." Assuming, however, that the authority given by the Board to the defendant in this matter was and could only have been given to him *qua* Director, it must be presumed that, when he was authorized to deal in shares on behalf of the Company, he had an implied authority to do so according to the known usages and customs of the local market; see the case of *Grissell vs. Bristowe*, L. R. 3 C. P. 112, cited in *Palmer vs. Rhodes*, 4 H. C., at p. 60. That being so, we have the evidence of the defendant, and it is not denied, that according to the rules of the local Stock Exchange any transaction on that Exchange has to be effected through a broker. Dealers cannot sell there without the agency of a broker, who is entitled to a commission of 1 per cent. Whether therefore the defendant sold these shares himself in his capacity as a broker, or whether he employed another broker for the purpose, the result to the company would have been the same. The 1 per cent. would in any case have been deducted, or to speak more accurately, according to the proper theory of such transactions, in any case it would have had to be paid by the Company and the balance would have represented the net proceeds of the sales. From this point of view, it seems impossible to regard this sum as money had and received on behalf of the Company, or unduly detained from the Company, and for which the defendant is therefore bound to account. Of course, if it had been alleged that there had been any element of fraud, or *mala fides*, on the part of the defendant, or if it had been suggested that he had effected these sales to the detriment of the Company and in order to gain his commission at their expense, the case would have been a very different one, and probably the defendant might have been held personally responsible for any resulting loss. But nothing of the kind

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is suggested, and it is in fact admitted that the transactions in question resulted in a substantial profit to the plaintiff Company. At the same time, I do not wish to be understood as intimating any approval of proceedings of this kind; as I have already observed, there seems to have been, to say the least, an absence of delicacy in the action of the defendant and his colleague, Mr. Philip, in this matter, and they certainly placed themselves in a very inconvenient and invidious position. I might indeed go further and say that if it had been attempted to interdict these transactions, or to remove the defendant from his position as a Director on account of them, it is very possible that such an attempt might have proved successful; or, once more, if the defendant had actually paid over the gross proceeds of these sales to the Company, and was now suing for his commission thereon, it is possible, on the authority of cases like that to which I referred during the argument of *Harrington vs. Victoria Graving Dock Co.*, 3 Q. B. D. 549, that a plea might have been maintained to the effect that the defendant had placed himself in a position in which his interest was in conflict with his duty, and was therefore not entitled to recover the reward or remuneration which would otherwise have been his due. But that is not this case, and the present seems rather to be one of that numerous class of cases to which the maxim applies, *melior est conditio possidentis*, or, to use the terms of the civil law, it is one of those cases where the relation between the parties and the state of the facts might well support an *exceptio* but are not sufficient to maintain the *condictio indebiti soluti*. For these reasons I do not think that the action as for money had and received can be maintained against the defendant on the facts before us. There is, however, another aspect in which these facts may be regarded, and on which, though it does not affect my conclusion, it may be as well to add a few words. The commission received by a broker on a sale must, as already observed, be regarded in theory not as deducted by him but as remuneration paid to him by his principal. It cannot be denied that, the Directors of this Company being authorized to deal in shares, they had an implied authority to pay the brokerage due on such dealings; such a payment would be



one of the ordinary current disbursements of the Company for which no special authority would be considered necessary. These sums, therefore, having been paid to the defendant on behalf of the Company, the claim for their recovery seems to amount to an assertion that they were paid under an error as to the legal position and relation of the parties, and through a failure to draw the distinction between an ordinary broker and a broker who, being a director, was as such legally disqualified from receiving such payments. But there having been no error as to the facts, that really amounts to a claim to recover money paid under a mistake of law, and such a claim, as is now well established, cannot be maintained under the Colonial any more than it can under the English Law, at all events, as it was put by CONNOR, J., in the case of *Port Elizabeth Divisional Council vs. Uitenhage Divisional Council*, Buch. 1868, at p. 225, unless there is "a natural equity on the side of him who claims the *condictio indebiti soluti*." I may also refer on this point to the decision to the same effect of the High Court of the Transvaal in the case of *Booth vs. The State* (reported in the *Eastern Star* of October 10th, 1888), where all the authorities on the subject were reviewed, in a very elaborate and exhaustive judgment, by KOTZE, C.J. On the whole, therefore, I am of opinion that whether we look at the present action as one for the recovery of money had and received by the defendant to the use of the plaintiffs, or as one for the recovery of money paid in error, from either point of view the claim cannot be maintained, and our judgment must be for the defendant, with costs.

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COLE, J., concurred. (a)

[Plaintiffs' Attorneys, CALDECOTT & BELL.  
Defendant's Attorneys, KNIGHTS & HEARLE. ]

(a) This judgment was confirmed on appeal by the Supreme Court on Feb. 25th, 1890.



## MAGISTRATE'S COURT CASES REVIEWED.

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QUEEN vs. MORRIS.

*Indictment—Theft.*

*Where A. was charged with and convicted of stealing goods, the property of B., and the evidence shewed that the goods belonged to C., the conviction was quashed.*

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LAURENCE, J.P. :—A case has come before me in review in which a man named Morris was charged before the Police Magistrate of Kimberley with stealing a blanket, the property of one France. He pleaded not guilty but was convicted and sentenced. The evidence however clearly shewed that the blanket in question was the property not of France but of a man named Irwell. On this being proved, the Magistrate should have amended the charge; but as he omitted to do this it is clear that the evidence does not support either the charge or the conviction. The Crown Prosecutor, who has seen the papers, is unable to support the conviction and it must therefore be quashed.

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QUEEN vs. SWANSON.

*Indictment.—Railway Bye-Laws.—Ord. 6, 1839.*

*Where three prisoners were charged in one indictment with the commission of distinct offences, and the charge was erroneously stated, and neither the date nor the place of*

*commission of the offence was alleged, the conviction was quashed.*

*When a prisoner is charged with contravention of a bye-law, for which only a pecuniary penalty is provided, he cannot be sentenced in default of payment to imprisonment with hard labour under the provisions of Ord. 6 of 1839; neither can he be sentenced to imprisonment thereunder unless it appears of record that the Magistrate was satisfied, either by the prisoner's confession or otherwise, that the fine could not be levied.*

LAURENCE, J.P.:—A man named Swanson was charged on July 15 before the Police Magistrate of Kimberley with contravening “Cl. 14, Sect. VII. of the railway bye-laws in that upon or about the 14th day 188 and at or near in the said District” he “trespassed on the railway premises without lawful excuse.” He was convicted and sentenced to pay a fine of 20s. or one month’s hard labour. Being unable to pay the fine, he was taken to gaol, whence he addressed a letter to the Registrar, complaining of the proceedings in his case, and which letter appeared to disclose facts *primâ facie* requiring investigation. I accordingly requested the Police Magistrate to report upon the allegations made by the prisoner, and after receiving his report sent it to the Crown Prosecutor for his consideration and also obtained the record. This record is certainly a remarkable document. It is to be observed that the case is one which in ordinary circumstances would not come before the Judges in review; and I can only say that I hope it is not a fair specimen of the manner in which records in such cases are usually kept. If so, the case might well be commended to the attention of certain persons—some of whom are old enough and ought to be wise enough to know better—who appear to consider that the judicial review of Magistrates’ sentences is a vexatious and objectionable feature in our legal system. In the first place, what is the offence charged? It is that of contravening “clause 14, sect. VII.” of the railway bye-laws. Clause 14 of the railway bye-laws provides that “any person wilfully trespassing upon the railways, or upon any of the stations or other works

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connected therewith, or found sleeping in any carriage or truck without permission of the Railway Department, is hereby subjected to a penalty not exceeding forty shillings." As to "sect. VII." however the only explanation which I can find of its appearance in the charge is that these bye-laws are printed in the "Government Railway Time Tables and Regulations," a publication of which the Magistrate had a copy before him, and which is divided into various sections, of which *e.g.* sect. V. contains the "Buffalo Harbour Regulations and Tariff," sect. VI. consists of "Time Tables" and sect. VII. of "Bye-laws." The charge therefore is erroneous *ab initio*; and instead of being charged with contravening "clause 14, sect. VII." the accused should have been charged with contravening clause 14 of the bye-laws framed and promulgated under the statutes in that behalf, namely Act 19, 1861, §§ 1 and 2, and the later enactments by which the provisions of this Act are applied to the Government system of railways. But for the supererogatory insertion of "sect. VII." in the beginning of the charge ample compensation is certainly made by the omission of all the other particulars which a criminal charge should contain. All that is alleged is that the crime was committed "on or about the 14th day 188," but what was the month, what was the year, what was the place, all this is left in complete uncertainty; not one of these particulars is supplied, and for all that appears on the charge sheet the alleged offence might have been committed on the 14th day of any month in the present decade and at any place within the limits of the District of Kimberley. As if however these irregularities were insufficient, yet another remains to be pointed out, namely, that Swanson was not charged alone but with two other prisoners, who according to the evidence committed a similar offence but, on distinct occasions, and not in any way acting in concert or combination, even assuming combination or conspiracy to be possible in a matter of this kind. It is clear that no charge which presents such an accumulation of errors and mass of irregularities could possibly be allowed to stand; and, with the concurrence of the Crown Prosecutor, the prisoner has already been discharged, formal mention of the matter

having to be postponed till the next sitting of the Court. Apart however from these irregularities in the charge—as to which I can only say that I hope the attention which has now been publicly drawn to them will be sufficient to prevent their repetition—the case is one the substance of which gives rise to more than one question of considerable difficulty. According to the statement made by the accused, he merely went to the railway station to see a friend off by the train and had only been there a few minutes when he was arrested for trespassing, and he adds that he had witnesses whom he wished to be called to prove these facts. The record however simply states that “the prisoners call no witnesses;” and according to the evidence and the Magistrate’s report the prisoner was simply loafing on the platform and refused to leave when ordered to do so. Now it might perhaps be argued that as the railway premises were open to the public at the time, and a train was about to leave, the case was not one of “wilful trespass” such as is contemplated by the bye-law. On the other hand, the fact that the accused remained on the premises, after having been directed to leave, might perhaps be held to constitute such a trespass; and at all events the point is one which, for the purposes of the present case, it seems unnecessary to decide. There remains, however, the further point that the only penalty provided for an infringement of the bye-law is a fine of 40s., and that the Magistrate not only imposed a fine but added a month’s hard labour in default of payment. Now possibly an alternative sentence of imprisonment might be justified under the provisions of Ord. 6 of 1839, sect. 2; but before such sentence can be imposed the Magistrate must be satisfied, either by the prisoner’s own admission or otherwise, of his inability to pay a fine, and that he has no goods whereon a writ of execution could be levied, and there is nothing on record to shew that he was so satisfied in the present case. Moreover even if this preliminary condition had been complied with, the Ordinance says nothing about hard labour, and the case is therefore one to which the observations of BARRY, J.P., in *Queen vs. Sepongo*, 4 E. D. C. at p. 272, apply, where he says: “It is clear that in the present case, since hard labour is attached, the Magistrate had not the Ordinance present to

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his mind; and moreover there is here no confession or evidence on record to shew the Magistrate was entitled to commit the accused to gaol;” and see also *Queen vs. George*, *ib.* 273. For the reasons stated, these proceedings must be quashed; and I can only conclude by again expressing the hope that such serious irregularities of procedure, in a matter involving the liberty of the subject, will not again be brought to my notice.

### QUEEN vs. JACK.

#### *Indictment.—Theft.*

*Where a prisoner was charged with and convicted of stealing a goat, the property of some person unknown, and in the course of the trial the owner came forward and identified the stolen goat as his property, and no amendment was made in the charge, the conviction was quashed.*

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COLE, J.:—A case has come before me as Judge of the week in which a prisoner named Jack was convicted by the Acting Magistrate of Barkly West of “stealing one goat, the property of some person or persons unknown.” It appears that the owner was at first unknown, but after a remand came forward and identified the goat as his property. The charge not having been amended, the case falls within the same principle as that of *Queen vs. Morris*, decided the other day (see *supra*, p. 492) and the conviction must therefore be quashed.

### QUEEN vs. BOSTANDER.

*Theft.—Confession.—Ord. 72, § 28.—Act 17, 1867.—  
Act 19, 1884.*

*Where a prisoner was convicted and sentenced, under the provisions of Act 17 of 1867, on a charge of stealing a sheep, and the evidence made it probable that the sheep had died*



*and that the prisoner was guilty, if at all, only of the theft of portion of the carcase, the conviction was quashed.*

*Where a prisoner had been induced by threats and violence to make certain admissions and point out where certain property, which he was suspected of having stolen, was concealed: held, that all the evidence thus extorted must be rejected as inadmissible.*

LAURENCE, J.P. :—Jan Bostander was charged before the Magistrate of Hay, under the provisions of Act 17 of 1867, with the crime of stock theft, in that he stole one sheep, the property of one Kuhn. He pleaded not guilty but was convicted and sentenced. The case rested mainly on the evidence of Kuhn, who stated that he had missed several of his sheep and accordingly made an investigation, with the result that he discovered in the veldt some of the offal of a sheep which had recently been slaughtered. In the neighbourhood he found a spoor which he recognised as that of the prisoner, who was in his employ as a herd. He accordingly questioned the prisoner, who informed him that a sheep had died the previous day and that he had the skin, which he produced, in his possession, but asserted that the meat had been eaten by aasvogels. Kuhn, not believing this, asked him to point out where the meat was and, on the prisoner refusing to do so, he admits that he assaulted him and, judging from the details he himself gave and from the appearance which the prisoner seems to have presented in Court, the assault must have been of a somewhat serious description. By this conduct Kuhn undoubtedly put himself in the wrong and, while not ignoring the difficulties under which, in circumstances of this kind and in isolated localities, farmers and others frequently labour, it is much to be regretted that they should, even under provocation, behave as Kuhn admits that he did. I say that this is much to be regretted on many grounds and not least because such conduct naturally in some instances leads to retaliation and may possibly end in the commission of some grave deed of violence of which more than one painful example has within our experience occurred. In the end the prisoner was tied up and was induced to point out a place where the greater

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part of the carcase was found and also the place where, as he asserted, the animal had died. Kuhn admitted that the appearance of the skin was such as would have been presented if the animal had died, and another of his servants, who was called for the Crown, expressed a strong opinion, for which he gave his reasons in detail, to the same effect. The prisoner in his defence said the same thing. There was no direct evidence to identify the carcase as that of one of Kuhn's sheep but the prisoner appears to have virtually admitted that this was so and to have based his defence on the ground that the animal had died a natural death. On reading the record, the case struck me as in several respects unsatisfactory and I accordingly sent it without comment to the Crown Prosecutor for his opinion, and he returned it with a memorandum shewing that he had felt much the same difficulties as I had myself experienced about the conviction. In the first place, bearing in mind the provisions of sect. 28 of Ord. 72 of 1830, I think the case is one in which the admissions made by the prisoner were not properly receivable as evidence. The Ordinance enacts that confessions by accused persons shall be admissible "provided always that such confession shall be proved to have been freely and voluntarily made by such person, in his sound and sober senses, and without having been unduly influenced thereby." I presume that we must here read the word "thereby" as equivalent to "thereto;" but however that may be it is impossible to regard the statements made by the prisoner in this case, even if they are to be considered as a confession, as having been "freely and voluntarily made." If we discard these statements there is nothing to connect the prisoner with the portion of the carcase which was found and it would be impossible to hold that the mere fact that his spoor had been observed in the neighbourhood of certain offal was sufficient to convict a herd of the theft of a sheep. Moreover the evidence seems to make it at all events extremely probable that this sheep was not slaughtered but died from natural causes as alleged by the prisoner. In that case it is possible that the prisoner may have intended to steal or did actually steal the carcase and might therefore have been charged under the provisions of Act 19 of 1884;

but he has been charged and convicted under Act 17 of 1867, the provisions of which, as was pointed out in the case of *R. vs. Stephanus*, 4 H. C. 235, do not apply to cases where there is nothing to prove that the animal itself was stolen, but the evidence is merely to the effect that the prisoner was found in possession of some portion of the carcass. The present conviction must therefore be quashed.

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QUEEN vs. KOOS.

*Theft.—Possession.—Indictment.—Acts 17 of 1867, 17 of 1874 and 19 of 1884.*

*Where a prisoner was charged with stock theft, under the provisions of Acts 17 of 1867 and 17 of 1874, in that he was found in the unlawful possession of two sheep-skins, the conviction was quashed.*

LAURENCE, J.P.:—A prisoner named Koos was charged before the Acting Magistrate of Hay, under the provisions of Acts 17 of 1867 and 17 of 1874, “with the crime of theft of cattle in that he was in the unlawful possession of two sheep-skins, the property of some person or persons unknown, and was unable to give a satisfactory account of how he became possessed of them.” On this charge he was convicted and sentenced. Neither of these Acts however renders it an offence to be in possession of skins or enacts that any person unable to justify such possession shall be liable to conviction for theft. Of course the prisoner might have been simply charged with theft of the skins, but in that case the Crown would have had to prove not only possession but also that the property had been recently stolen, before he could have been convicted. A charge might also perhaps have been laid under the provisions of Sect. 1 of Act 19 of 1884; but the present proceedings are clearly misconceived and the conviction must therefore be quashed.

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## QUEEN vs. WILSON.

*Forgery.—False Pretences.—Indictment.—Remittal.—  
Act 20, 1856, § 42.—Splitting charges.*

*A prisoner having been committed for trial on a charge of forgery and attempting to obtain money under false pretences, the case was remitted under ordinary jurisdiction. The prisoner was then charged with the above offence on two counts and sentenced on each to three months' hard labour. Held, on review, that the conviction on the second count must be quashed.*

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Wilson.

COLE, J.:—A native prisoner named Wilson *alias* Simon was charged with the crime of forgery and attempting to obtain money by means of false pretences and was committed for trial by the Magistrate of Kimberley on this charge. The case was remitted by the Crown Prosecutor under ordinary jurisdiction. The evidence was to the effect that the prisoner, while in the employ of the De Beer's Consolidated Mines, had forged the initials of the time-keeper to certain working tickets and had thereby attempted to obtain wages for more days than he had actually worked. On the case being remitted, the prisoner was charged on separate counts with the forgery and false pretences and, having pleaded guilty, was sentenced to three months' hard labour on each count or six months in all. The case however having been remitted under ordinary jurisdiction, and the offence having been practically one, I do not think the Magistrate was entitled, by splitting the charge or otherwise to pass a sentence exceeding three months, and as the Crown Prosecutor agrees in this view, as representing what he intended to be done, the conviction on the second count must be quashed.





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